137/661

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 111.

GEORGE F. PACKER, PLAINTIFF IN ERROR,

vs.

JAKE BIRD AND FRANK BIXLER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED SEPTEMBER 23, 1887.

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a In the Supreme Court of the State of California.

GEORGE F. PACKER, Plaintiff and Appellant,
vs.
JAKE BIRD and FRANK BIXLER, Defendants and Respondents. } No. 11162.

Transcript on Appeal from the Superior Court of Colusa County.

John T. Harrington, attorney for appellant.

Filed the 9th day of July, A. D. 1885.

J. W. McCARTHY, *Clerk*,
By J. J. PAULSELL,
Deputy Clerk.

1 In the Supreme Court of the State of California.

In the Superior Court of Colusa County, State of California.

GEORGE F. PACKER, Plaintiff,
vs.
JAKE BIRD and FRANK BIXLER, Defendants.

Complaint.

The plaintiff in the above-entitled action complains of the defendants in said action and avers that in the year 1867 plaintiff was, thence hitherto has been, and still is the owner in fee of that certain tract of land situate, lying, and being in Colusa county and described as follows: Beginning at the northeast corner of a
2 tract of land lately purchased by plaintiff from the estate of H. J. Glenn, deceased, or near the middle of section six of township eighteen north, range one west, which corner is in the middle of the first large slough east of the county road running from Colusa to Red Bluff, at a point half a mile south of the township line between townships eighteen and nineteen north, range one west; thence running west along the north boundary line of the said late purchase to the west boundary line of the Larkin's children's grant, at the quarter-section post, one-half mile south of said township line; thence running north along said line of said grant one mile to the quarter-section post, one-half mile north of said township line; thence running east parallel to said township line to the Sacramento river; thence running down said river to a point one-half mile south of said township line; thence running west to the middle of the aforementioned large slough; thence running along the middle of said slough toward the north and west to the place of beginning.

That within the exterior boundaries of said tract of land and lying and being easterly of the northerly portion thereof, but west of the channel of the Sacramento river, is a small parcel of land,

containing eighty acres, more or less, and commonly known as an island, in said river.

That heretofore, to wit, on January —, 1883, the said de-
3 fendants, without right or title, entered into the possession of said last-mentioned parcel of land or island and ousted and ejected the plaintiff therefrom and now unlawfully withhold the possession thereof from said plaintiff, to his damage in the sum of two hundred dollars.

That the value of the rents, issues, and profits of said land from the — day of January, 1882, is one hundred dollars.

Wherefore plaintiff prays judgment against said defendants for the recovery of the possession of the said demanded parcel of land above described, and for the sum of two hundred dollars damages for withholding the possession thereof, and for the sum of one hundred dollars, the value of the rents, issues, and profits, and costs of suit.

JOHN T. HARRINGTON,
Attorney for Plaintiff.

Indorsed: Filed February 4, 1884. W. H. Miles, clerk.

Answer.

(Title of court and cause.)

Now come the above-named defendants, and, answering plaintiff's complaint on file herein, for answer thereto defendants deny each and every allegation in said complaint contained.

4 Wherefore defendants demand judgment that plaintiff take nothing by reason of anything in said complaint contained, and that defendants have judgment for their costs herein incurred.

STABLER & BAYNE AND
W. G. DYAS,
Attorneys for Defendants.

Indorsed: Due service of within answer admitted this 26th day of February, A. D. 1884. John T. Harrington, attorney for plaintiff.

Indorsed: Filed February 26, 1884. W. H. Miles, clerk, by S. M. Bishop, deputy.

Findings.

(Title of court and cause.)

The above-entitled action coming on regularly for trial the court, having first heard and considered the evidence introduced by the respective parties, and also the arguments of the respective counsel, and being fully advised in the premises, finds the following facts:

I.

That the land here in question, to wit, the premises the possession

of which is demanded in the complaint herein, is situate in the county of Colusa and State of California, and is an island
5 containing eighty acres, more or less, which is located in the Sacramento river, and is the first island in said river southerly from the town of Butte City, in said county, and that an east and west line running through the center of section thirty-two, in township nineteen north, range one west, Mount Diablo base and meridian, and extending across said river would pass through the head or northerly end of said island or tract of land.

II.

That during the period extending from the year 1853 to the year 1858, and both prior and subsequent thereto, the waters of said Sacramento river divided into two streams at the upper or northerly end of said island, and one of said streams flowed through a channel extending around the easterly side of said island and the other through a channel extending around the westerly side of said island; that during all of said times each of said channels was plain and well defined and had high banks, and during all of said times the waters of said river flowed and still continue to flow through the said channels and both of them at all seasons of the year; that said two channels and the streams of water in them did during all of said times reunite at the lower or southerly end of said island; that during all of said times each of said channels and streams
6 constituted a part of said Sacramento river, and each of said streams had a thread or *medium filum aquæ*.

III.

That the west or right bank of the said Sacramento river along where said island lies, during all the period extending from the year 1853 to the year 1858 and both prior and subsequent thereto, lay and was west of the said channel and stream, which lay and passed westerly of said island as aforesaid, and during all of said time and times the tract of land here in dispute was located in said Sacramento river, surrounded by the waters thereof and east of the westerly margin of said river.

IV.

That during all the period extending from the year 1853 up to and including the present time the said Sacramento river was and is navigable, both in fact and by statute, from its mouth to points higher up the river than the location of the land here in dispute.

IV½.

That during the greater portion of each year, from the year 1852 to 1858, the channel on the westerly side of the land here in dispute was navigable and was at times during said time actually navigated, but the usual and most direct route for steamers was along the channel running east of said land.

7

V.

That the land here in dispute, to wit, said island, is not included within the calls of any of the muniments of title introduced herein in evidence by said plaintiff, the said muniments being a patent of the United States, dated the eighteenth day of December, A. D. 1857, to Francis Larkin and others, for that certain tract of land situate in said county of Colusa and commonly known as the rancho of Larkin's children; a decree of partition of said rancho among said patentees; a deed from F. Larkin to one Montgomery granting a part of said rancho, and a deed from Montgomery to plaintiff granting a part of said rancho.

VI.

That the survey of the land included in said patent was made in the month of June, 1857, by the officers of the United States thereunto duly authorized; that said survey was made under and pursuant to a decree duly made and given by the district court of the United States for the northern district of California, confirming an incomplete Mexican grant of a certain tract of land and ascertaining and determining its location, which said decree of confirmation was made on the fourteenth day of January, A. D. 1856, and said patent referring to said decree of confirmation recites, among other things, as follows, to wit: * * *

8 "The land to which confirmation was made, being known by the name of the rancho of Larkin's children, and is bounded and described as follows, to wit:

"Commencing at the northerly boundary line of said rancho, at a point on the Sacramento river just two leagues northerly from the rancheria called Lojot, and running southerly on the margin of said river to a point which is five leagues south of the place of beginning, thence west two leagues, thence north in a parallel line with said river and two leagues therefrom five leagues, and thence east two leagues to the place of beginning, and so as to contain the area of ten square leagues within said lines."

VII.

That said plaintiff is not now, was not at the commencement of this action, and never has been the owner or in the possession or entitled to the possession of the land here in dispute, to wit, said island, or any part thereof.

VIII.

That neither said defendants nor either of them did at the time alleged or at any other time oust and eject or oust or eject said plaintiff from the land here in dispute or any part thereof.

IX.

9 That at the time alleged in the complaint herein said defendants entered into the possession of the demanded premises, to wit, said island, and ever since have been and now

are in the possession of the same, and during all of said time have held and do now hold the possession thereof; but said plaintiff has not been damaged thereby in the sum of two hundred dollars or in any other sum or at all.

From the foregoing the court concludes—

(*a.*) That said plaintiff is not now, was not at the commencement of this action, and never has been entitled to recover from said defendants or either of them the possession of the demanded parcel of land in the complaint herein referred to and hereinabove described, to wit, said island, or any part thereof, or any damages for the withholding the possession thereof or any part thereof from him, or the value of the rents, issues, and profits thereof or any part of the same.

(*b.*) That said defendants are entitled to judgment herein, that said plaintiff take nothing, and that they do have and recover of him their costs in this behalf incurred.

Let judgment be entered accordingly.

Done this 19th day of Sept., A. D. 1884.

E. A. BRIDGFORD, *Judge.*

Endorsed: Filed Sept. 19, 1884. W. H. Miles, clerk, by S. M. Bishop, deputy.

10 *Judgment.*

(Title of court and cause.)

This cause having come on regularly for trial by the court without the intervention of a jury, a jury trial having been duly waived by both parties, the respective parties being represented by their attorneys, and after the introduction of testimony and the argument by attorneys on behalf of said parties, said above-entitled cause was submitted to the court for its consideration and decision; and now the court, having duly considered the same and delivered its findings and conclusions, which are filed, orders judgment to be entered in accordance therewith in favor of said defendants and against said plaintiff.

Wherefore it is by the court considered, ordered, and adjudged that said plaintiff, George F. Packer, take nothing, and that said defendants, Jake Bird and Frank Bixler, do have and recover of said plaintiff their costs in this behalf incurred, and which are hereby taxed at the sum of $124.40.

Rendered this nineteenth day of September, A. D. 1884.

A. E. BRIDGFORD, *Judge.*

Endorsed: Filed Sept. 22, 1884. W. H. Miles, clerk, by S. M. Bishop, deputy.

11 *Notice of Motion for a New Trial.*

(Title of court and cause.)

To the defendants, Frank Bixler and Jake Bird, and their attorneys, Richard Bayne and W. G. Dyas:

You will please take notice that the plaintiff in the above-entitled action intends to and will move the said superior court to vacate and set aside its findings and decision made and given in said action, and to grant the plaintiff a new trial of said action on the following grounds, to wit:

I.

Insufficiency of the evidence to justify the findings and decision of the court.

II.

That said findings and decision are against the evidence.

III.

That said findings and decision are against law.

IV.

Errors in law occurring at the trial and excepted to at the time by the plaintiff.

And you will further take notice that such motion will be
12 made and based upon a statement of the case or a statement on motion for new trial to be hereafter prepared and settled.

JOHN T. HARRINGTON,
Attorney for Plaintiff.

Endorsed: Due service of a copy of the within notice of motion for a new trial admitted this 20th day of October, 1884. W. G. Dyas and Stabler & Bayne, attorneys for defendant.

Endorsed: Filed October 20, 1884. W. H. Miles, clerk.

Statement on Motion for a New Trial.

(Title of court and cause.)

This cause came on regularly for trial before the court on the 20th day of June, 1884—John T. Harrington appeared for the plaintiff and Richard Bayne and W. G. Dyas appeared for the defendants—and the following proceedings were had therein:

J. B. De Jarnatt was sworn and testified as follows: I am a searcher of records and real-estate agent, and my business has been such as to enable me to make plats of land from observation. I know the land in controversy and made a map or plat of it. Ac-

cording to the United States survey this island or this land
13 in controversy is in section 32, in township 19 north, range one west.

Plaintiff next offered in evidence the map or plat of the land as made by the witness. Defendant objected to the introduction in evidence of the plat.

The witness thereupon testified: I made the plat from observation, without reference to any field-notes—as near as I could make it from my eye by getting a boat and riding around the entire island.

Defendant's objection was overruled and the plat admitted in evidence, which is annexed and appended hereto and marked thereon Packer's Island.

The plaintiff next offered and read in evidence the patent from the United States of the Larkins children's grant to Francis Larkin, Caroline Ann Larkin, Frederick Hobson Larkin, and Alfred Otis Larkin, dated December 12, 1857, and recorded May 24, 1858, in Book "A" of Patents, pp. 3 *et seq.*, Colusa county records. Accompanying the patent is a map and plat of the survey of said grant, which was also admitted in evidence.

The patent is as follows:

Whereas it appears from a duly authenticated transcript filed in the General Land Office of the United States that pursuant to the provisions of the act of Congress approved the third day of March, one thousand eight hundred and fifty-one, entitled
14 An act to ascertain and settle the private land claims in the State of California, the petition of Francis Larkin and his two sisters, Caroline N. and Sophia Adelaide Larkin, as claimants, was filed on the 24th day of March, 1852, with the commissioners to ascertain and settle private land claims in the State of California, sitting as a board in the city of San Francisco, in which petition they claimed the confirmation of their title to a tract of land "lying on the westerly side of the Sacramento river, called Larkin ranch, containing ten leagues, more or less, situate in the county of Colusa, in the State of California, said claim being founded on a Mexican grant to the petitioners, bearing date the 15th day of December, 1844, made by Manuel Micheltorena, governor commandant general and inspector of the department of the Californias, and approved by the territorial deputation on or about the 22nd April, 1846;

And whereas the board of land commissioners aforesaid, on the 25th of April, 1854, rendered a decree of confirmation in favor of the petitioners;

And whereas it further appeared that on the 27th day of June, 1854, a further petition was filed before said board by Frederick Hobson Larkin and Alfred Otis Larkin, as legal representatives of Sophia Adelaide Larkin, deceased, one of the parties to the petition first mentioned, whereupon the said board, on the 11th day of July, 1854, rendered an amended decree, from which amended
15 decree or decision of the commissioners an appeal was taken on behalf of the United States to the district court of the

United States for the northern district of California, by which, on the 14th of January, 1856, at a stated term, the said amended decree of the commissioners was confirmed, the land to which confirmation was made being known by the name of the rancho of Larkins' children, and is bounded and described as follows, to wit: Commencing at the northerly boundary line of said rancho at a point on the Sacramento river just two leagues northerly from the rancheria called Lojot and running southerly on the margin of said river to a point which is five leagues south of the place of beginning; thence west two leagues; thence north in a parallel line with said river and two leagues therefrom five leagues, and thence east two leagues to the place of beginning, and so as to contain the area of ten square leagues within said lines.

The lands of which confirmation is hereby made are confirmed to the said claimants in the following proportions, to wit, to Francis Larkin the one undivided third part of said tract of land, to Caroline N. Larkin the one undivided third part of said tract of land, to Frederick Hobson Larkin and Alfred Otis Larkin and to the legal representatives of Sophia Adelaide Larkin, deceased, the remaining undivided third part of said described tract of land, the said petitioners to hold said land as tenants in common.

16 And whereas it further appears from a certified transcript on file in the General Land Office that the Attorney General of the United States having given notice that no appeal to the Supreme Court of the United States would be prosecuted in this case, the said district court, on the 10th day of February, 1857, at a stated term, ordered, adjudged, and decreed that the order granting an appeal in this case to the Supreme Court of the United States be, and the same is hereby, vacated, and the claimants have leave to proceed under the decree of this court heretofore rendered in their favor as under final decree;

And whereas, under the 13th section of the act of 3d March, 1851, there has been presented to the Commissioner of the General Land Office a plat and certificate of the survey of the land confirmed as aforesaid, authenticated on the 16th of July, 1857, by the surveyor general of the public lands in California, which plat and certificate are in the words and figures following, to wit:

UNITED STATES SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, CALIFORNIA, *July 16th*, 1857.

Under and by virtue of the provisions of the 13th section of the act of Congress of the 3d of March, 1851, entitled An act to ascertain and settle the private land claims in the State of California, and of the 12th section of the act of Congress approved on the 31st

17 of August, 1852, entitled An act making appropriation for the civil and diplomatic expense of the Government for the year ending the thirtieth of June, eighteen hundred and fifty-three, and for other purposes, and in consequence of the certificate of the United States district court of the northern district of California, of which a copy is annexed, having been filed in his office, whereby it appears that the Attorney General of the United States, having given notice

that it was not the intention of the United States to prosecute the appeal from the decision of the said district court, by which it affirmed the decision of the board of commissioners appointed under the provisions of the said act of the 3d of March, 1851, to ascertain and settle the private land claims in the State of California, by which they recognized and confirmed the title of Francis Larkin, Caroline Ann Larkin, Frederick Hobson Larkin, Alfred Otis Larkin, and of the legal representatives of Sophia Adelaide Larkin, deceased,—have become final, I have caused the same to be surveyed in conformity to the grant thereof and the said decisions, and do hereby certify the annexed map to be a true and accurate plat of the said tract of land as appears by the field-notes of the surveyor thereof, made by Abram W. Thompson, deputy surveyor, in the month of June, 1857, under the direction of this office, which, having been examined and approved, are now on file therein.

18 And I do further certify that under and by virtue of the said confirmation and survey the said hereinafter-named confirmees are entitled to a patent from the United States, upon the presentation hereof to the General Land Office, for the said tract of land as tenants in common and according to their respective shares or interests therein as specified in the said decree of the said district court—that is to say, to Francis Larkin the one undivided third part of said tract of land, to Caroline Ann Larkin the one undivided third part of said tract of land, to Frederick Hobson Larkin and to Alfred Otis Larkin and to the legal representatives of Sophia Adelaide Larkin, deceased, the remaining undivided third part of said described tract of land, the said tract of land being bounded and described as follows, to wit:

Beginning at an oak post six feet high and six inches square, marked L C R No. 1, on the right bank of the Sacramento river, from which a willow tree six inches in diameter, marked B T, bears north five degrees east, distant one hundred links, as the northeast corner of the rancho, being four leagues south of the mouth of Stony creek, on the line between sections six and seven, and fifty-seven chains east of the post on the line between ranges one and two west, township nineteen north, corner sections six, seven, one, and twelve, thence, traversing the right bank of the Sacramento river down-stream and ac-

19 cording to the true meridian (the variation of the magnetic needle being sixteen degrees forty-five minutes east), south nine degrees forty-five minutes west forty-four chains to station, a house on the east side of the Shasta road bearing west, distant thirty-two chains; thence east twenty chains to station, a house on the west side of the Shasta road bearing south forty-six degrees west; thence north fifty-seven degrees thirty minutes east nineteen chains to station; thence north eighty degrees forty-five minutes east thirty-two chains to station; thence north sixty-five degrees forty-five minutes east thirty-one chains to station; thence north two degrees thirty minutes west, at eighteen chains Belhen's house is one chain east of line, thirty-seven chains to station; thence north twenty-four degrees thirty minutes east twenty-five chains to station; thence south fifty-seven degrees east twenty-four chains to station; thence

south ten degrees west thirty-two chains to station; thence south fifteen degrees west twenty-eight chains to station; thence south sixty-nine degrees fifteen minutes west, at forty chains an old rancheria on the river bank, forty-five chains to station; thence south eighty-six degrees west forty-four chains to station, north end of island in the river and old rancheria on river bank; thence south ten degrees east fifty-six chains to station, the house on the west side of the Shasta road bearing north seventy-seven degrees
20 west; thence south eighteen degrees east sixty-two chains to station, old rancheria on the river bank and south end of island in river; thence south seven degrees east, at thirty-five chains an old Indian rancheria on river bank, forty-six chains to station; thence south sixty-three degrees forty-five minutes west, passing old rancheria on river bank, twenty-nine chains to station; thence south fourteen degrees west twenty-one chains to station, a house on the west side of the Shasta road bearing south sixty degrees west; thence south twenty-one degrees east twenty-two chains to station, the last-mentioned house bearing south seventy-eight degrees west and Griswold's house bearing south fifty-six degrees west; thence south sixty degrees east twenty-five chains to station; thence south sixty-five degrees fifteen minutes east forty chains to station, passing an old rancheria on the river bank and Griswold's house bearing south eighty degrees west; thence south twenty-five degrees east thirty-eight chains to station; thence south fourteen degrees west thirty-one chains to station, a house on the west side of the Shasta road bearing south eighty-six degrees west; thence south thirty-eight degrees west seventy-five chains to station, the north end of an island in the river, which is here only about three chains wide; thence north fifty-four degrees fifteen minutes west, passing an old rancheria on
21 the river bank and sand banks on both sides of river, twenty-three chains to station; thence west thirty-eight chains to station, a house on the west side of the Shasta road bearing north forty-six degrees west; thence south sixteen degrees forty-five minutes west, at three chains intersects the line between townships eighteen and nineteen north, forty-eight chains east of the corner to townships eighteen and nineteen north of range one and two west, and near which intersection the old Lojot rancheria was situated, thirty-two chains to station; thence south forty-eight degrees east twenty-seven chains to station, one chain and fifty links easterly from a small house on west side of Shasta road; thence south four degrees west, at thirty chains passes an old rancheria on the river bank, at fifty chains passes the south end of island in river, at seventy-one chains passes one hundred and fifty links easterly from Willett's house, on the east side of the Shasta road, at seventy-five chains passes two chains easterly of a rancheria, eighty-five chains to station; thence south eleven degrees east seventeen chains to station, and passes north end of island in river; thence south three degrees east, at eighteen chains line is two chains and fifty links easterly from Clark's house on the west side of the Shasta road, at thirty chains passes the south end of island in river, at fifty-one

chains line passes fifty links easterly from John Helvestein's
22 house on the east side of the Shasta road, fifty-two chains to station; thence south sixty-three degrees fifteen minutes east fourteen chains to station; thence south ten degrees west, at fifteen chains the line is eight chains easterly of a small house on the east side of the Shasta road, at nineteen chains the line is seven chains easterly of a blacksmith shop on the east side of the Shasta road, at twenty-two chains an old rancheria four chains to the west, at thirty chains Vansickle store is one chain to the west, at thirty-six chains a rancheria is five chains to the west, at forty-three chains Annette's house, on the west side of the Shasta road, is five chains to the west, forty-four chains to station; thence south thirty-seven degrees thirty minutes east thirty-nine chains to station; thence south six degrees west, at ten chains Mill's house, on the east side of the Shasta road, bears west, distant eighteen chains, fifty-five chains to station, from which Grigsby's house, on the east side of the Shasta road, bears north forty-four degrees west, distant twenty-one chains; thence south eighteen degrees east forty-three chains to station; thence south fifty-eight degrees thirty minutes east twenty-nine chains to station; thence north forty-seven degrees east twenty-three chains to station; thence south sixteen degrees forty-five minutes west ten chains to station; thence south fifty-eight degrees west forty-seven chains to an old adobe house, station six chains easterly from Cregler's house, on the east
23 side of the Shasta road; thence south seventeen degrees west, at sixteen chains passes a rancheria on the river bank, twenty-two chains to station; thence south six degrees east, at fifteen chains passes the north end of an island in the river, thirty-six chains to station; thence south thirty-five degrees forty-five minutes west twenty chains to station, on the line between townships seventeen and eighteen north, two chains east of the corner to sections five, six, thirty-one, and thirty-two, in townships seventeen and eighteen north of range one west; thence (the variations of the magnetic needle being sixteen degrees fifty minutes east) south sixty degrees west, at five chains passes the south end of island in the river, twenty chains to station; thence north sixty-four degrees forty-five minutes west twenty-one chains to station; thence south forty-seven degrees west forty chains to station; thence south thirty-three degrees west sixty-four chains to station, from which a house on the west side of the Shasta road bears west, distant twenty-three chains, and from which house the house of Helvestein, on the east side of the road, bears north five degrees east, distant twenty chains; thence south fourteen degrees east twenty-eight chains to station; thence south fifty-one degrees west twenty-eight chains to station, one chain east of a house on Indian mound, and thence south ten degrees
24 east forty-seven chains to the southeastern corner of the rancho, a blazed white oak tree forty inches in diameter, marked L C R No. 2, on the right bank of the Sacramento river, from which a white oak thirty inches in diameter, marked B T, bears north thirty-two degrees west, distant one hundred and thirty links, and another white oak thirty inches in diameter, marked B T, bears south twenty-three degrees east, distant one hundred and twenty

links, said corner being five leagues south from the place of beginning and being six chains upstream from the house of Joseph Huntz, at the old rancheria ground formerly known as the Nine-Mile House; thence (the variations of the magnetic needle being sixteen degrees fifty minutes east) west, at two chains the Shasta road, one chain wide, bearing north and south; at four chains crosses a ditch and fence, bearing north and south, and enters a wheat field; at twenty-four chains leaves the wheat field and crosses a ditch and fence; at fifty-one chains intersects an offset line heretofore ran between sections thirteen and fourteen, twelve chains and fifty-six links south of the corner to sections eleven, twelve, thirteen, and fourteen, in township seventeen north of range two west, at a post marked L C R, and the numbers of the sections, township, and range, three hundred and seventy-one chains to an oak post six feet high and six inches square, marked L C R No. 3, in a mound of earth, with trench and pits, on the line between sections seventeen and eighteen, in
25 township seventeen north of range two west, station and southwest corner of the rancho; thence (the variation of the magnetic needle being seventeen degrees east) north, at twelve chains and fifty-six links a charred post in a mound of earth, with trench and pits for easterly corner to sections seven and eighteen; at fifty-two chains and fifty-six links a charred post in a mound of earth, with trench and pits for quarter-section corner on eastern line of section seven; at fifty-six chains and fifty-six links crosses a farm road bearing northwest and southeast; at ninety-two chains and fifty-six links a charred post in mound of earth, with trench and pits for easterly corner to sections six and seven (variation of the magnetic needle seventeen degrees forty-six minutes east); at one hundred and thirty-two chains and fifty-six links a charred post in mound of earth, with trench and pits for quarter-section corner on the eastern line of section six, one hundred and seventy-three chains and fifty-six links to the established post, corner to sections five, six, thirty-one, and thirty-two, on the north boundary of township seventeen north, range two west, station; thence (the variation of the magnetic needle being seventeen degrees east) east on the township line, at forty chains the quarter-section post on line between sections five and thirty-two, eighty chains to the post established as corner to sections four, five, thirty-two, and thirty-three, station; thence
26 (the variation of the magnetic needle being seventeen degrees east) north, at forty chains a charred post in mound of earth, with trench and pits for quarter-section corner on easterly line of section thirty-two; at eight chains a charred post in mound of earth, with trench and pits for easterly corner of sections twenty-nine and thirty-two; at one hundred and twenty chains a charred post in mound of earth, with trench and pits for quarter-section corner on the easterly line of section twenty-nine; at one hundred and sixty chains a charred post in mound of earth, with trench and pits for the easterly corner to sections twenty and twenty-nine; at two hundred chains a charred post in mound of earth, with trench and pits for quarter-section corner on easterly line of section twenty; at

two hundred and forty chains a charred post in mound of earth, with trench and pits for easterly corner of sections seventeen and twenty; at two hundred and eighty chains a charred post in mound of earth, with trench and pits for quarter-section corner on easterly line of section seventeen; at three hundred and twenty chains a charred post in mound of earth, with trench and pits for easterly corner of sections eight and seventeen; at three hundred and sixty chains a charred post in mound of earth, with trench and pits for quarter-section corner on easterly line of section eight; at four hundred chains a charred post in mound
of earth, with trench and pits for easterly corner to sec-
27 tions five and eight (variation of the magnetic needle be-
ing seventeen degrees and thirty-seven minutes east); at four hundred and forty chains a post in mound of earth, with trench and pits for quarter-section corner on the easterly line of section five; at four hundred and seventy-nine chains and fifty links the established corner to sections four, five, thirty-two, and thirty-three, on the line between townships eighteen and nineteen north, of range two west (the variation of the magnetic needle being seventeen degrees east); at five hundred and nineteen chains and fifty links a charred post in mound of earth, with trench and pits for quarter-section corner on the easterly line of section thirty-two; at five hundred and fifty-nine chains and fifty links a charred post in mound of earth, with trench and pits for easterly corner to sections twenty-nine and thirty-two (variation of the magnetic needle sixteen degrees thirty-five minutes east); at five hundred and ninety-nine chains and fifty links a charred post in mound of earth, with trench and pits for quarter-section corner on easterly line of section twenty-nine; at six hundred and thirty-nine chains and fifty links a charred post in mound of earth, with trench and pits for easterly corner to sections twenty and twenty-nine (the variation of the magnetic needle being sixteen degrees thirty minutes east); at six hundred and
forty-nine chains and fifty links crosses a dry slough thirty
28 links wide, course easterly; at six hundred and seventy-four
chains and fifty links another dry slough twenty links wide, course easterly; six hundred and sixty-nine chains and fifty links to a charred post in mound of earth, with trench and pits, station, and also quarter-section corner on the easterly line of section twenty; thence (the variation of the magnetic needle being sixteen degrees thirty minutes east) west, at ten chains crosses a dry slough thirty links wide, course southeasterly; at forty chains a charred post in mound of earth, with trench and pits in centre of section twenty; eighty chains to a charred post, in mound of earth, with trench and pits, station, and also quarter-section corner on the line between sections nineteen and twenty; thence (the variation of the magnetic needle being sixteen degrees thirty minutes east) north, at forty chains a charred post in mound of earth, with trench and pits for easterly corner to sections eighteen and nineteen; at fifty-four chains crosses a slough twenty links wide, course southeasterly; at eighty chains a charred post in mound of earth, with trench and pits for quarter-section corner on the easterly line of section eighteen; at one hun-

dred and twenty chains a charred post in mound, with trench and pits for easterly corner to sections seven and eighteen; at one hundred and sixty chains a charred post in mound of earth, trench and pits for quarter-section corner on the easterly
29 line of section seven; two hundred chains to a charred post in mound of earth, with trench and pits, station, and being corner to sections five, six, and seven (this station, at a variation of the magnetic needle of sixteen degrees east, is eighty chains and forty links south of the corner to sections five and six, on the north boundary of township nineteen north of range two west); thence (the variation of the magnetic needle being sixteen degrees forty-four minutes east) east, at forty chains a charred post in mound of earth, with trench and pits for quarter-section corner on southerly line of section five; at eighty chains a charred post in mound of earth, with trench and pits for southerly corner to sections four and five; at one hundred and twenty chains a charred post in mound of earth, with trench and pits for quarter-section corner on the southerly line of section four; at one hundred and sixty chains a charred post in mound of earth, with trench and pits for southerly corner to sections three and four; at two hundred chains a charred post in mound of earth, with trench and pits for quarter-section corner on the southerly line of section three, and being four chains north of a lone live-oak tree twenty-four inches in diameter; at two hundred and forty chains a charred post in mound of earth, with trench and pits, southerly corner to sections two and three; at two hundred and fifty-five chains crosses a dry slough twenty
30 links wide, course southwest; at two hundred and eighty chains a charred post in mound of earth, with trench and pits for quarter-section corner on the southerly line of section two; at two hundred and ninety chains the middle of a dry pond one chain in diameter; at three hundred and twenty chains a charred post in mound of earth, with trench and pits for southerly corner to sections one and two; at three hundred and fifty-nine chains and fifty links a charred post in mound, with trench and pits for quarter-section corner on the southerly line of section one; at three hundred and eighty chains crosses a dry slough thirty links wide, course northeast; at three hundred and eighty-two chains crosses the Shasta road, bearing north and south; at three hundred and ninety-nine chains the established corner to sections one, twelve, six, and seven, at the line in township nineteen north between ranges one and two west (variation of the magnetic needle being sixteen degrees forty-five minutes east); at four hundred and twenty-nine chains crosses Gibson's fence, bearing north and south, and his house bears south thirty degrees east, distant eighteen chains; at four hundred and thirty-six chains and fifty links crosses Gibson's fence, bearing north and south, and enters a thicket of oak timber and brushwood; at four hundred and thirty-six chains and sixty links crosses a farm road bearing north and south; at four hundred and thirty-
31 seven chains crosses a dry slough twenty links wide, course south; at four hundred and thirty-nine chains a charred post in mound of earth, with trench and pits for quarter-section corner

on the southerly line of section six; four hundred and fifty-six chains to the post on the right bank of the Sacramento river, at the place of beginning, containing forty-four thousand three hundred and sixty-four acres and twenty-two hundredths of an acre, and being designated upon the plats of the public surveys as *being* lot number thirty-seven, in township seventeen north, of range one west; lot number thirty-seven, in township seventeen north, of range two west; lots numbers thirty-seven and thirty-eight, in township eighteen north, of range one west; lot number thirty-seven, in township eighteen north, of range two west; lot number thirty-seven, in township nineteen north, of range one west, and lot number thirty-seven, in township nineteen north, of range two west, of the Mount Diablo meridian.

In witness whereof I have hereunto signed my name and affixed the seal of my office this 16th day of July, A. D. 1857.

(Signed) JOHN C. HAYS,
[L. S.] *U. S. Surveyor General, California.*

Now, know ye that the United States of America, in consideration of the premises and pursuant to the provisions of the act
32 of Congress aforesaid of 3d of March, 1851, have given and granted, and by these presents do give and grant, unto the said Francis Larkin, Caroline Anne Larkin, Frederick Hobson Larkin, and Alfred Otis Larkin and the legal representatives of Sophia Adelaide Larkin, deceased, and to their heirs the tract of land embraced and described in the foregoing survey in the following proportions, to wit:

To Francis Larkin, one undivided third part; to Caroline Ann Larkin, one undivided third part; to Frederick Hobson Larkin and Alfred Otis Larkin and to the legal representatives of Sophia Adelaide Larkin, deceased, the remaining undivided third part of said tract of land, but with the stipulation that in virtue of the 15th section of the said act the confirmation of this said claim and this patent shall not affect the right of third persons:

To have and to hold the said tract, with the appurtenances, in the proportions aforesaid, respectively, unto the said Francis Larkin, Caroline Ann Larkin, Frederick Hobson Larkin, and Alfred Otis Larkin and the legal representatives of Sophia Adelaide Larkin, deceased, and to their heirs and assigns forever, with the stipulation aforesaid.

In testimony whereof I, James Buchanan, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

33 Given under my hand, at the city of Washington, this eighteenth day of December, in the year of our Lord one thousand eight hundred and fifty-seven, and of the Independence of the United States the eighty-second.

By the President:

[L. S.] JAMES BUCHANAN.

Recorded volume I, pages 145 to 160, inclusive.

I. N. GRANGER,
Recorder of the General Land Office.

Plaintiff next offered and read in evidence certain documentary testimony and mesne conveyances showing the complete transmission of the title from the patentees and grantees named in the foregoing patent of a portion of the lands described therein to A. Montgomery, the plaintiff's grantor.

And plaintiff then offered and read in evidence the deed from A. Montgomery to him, dated May 1st, 1867, recorded May 2d, 1867, in Book C of Deeds, p. 584, Colusa county records, by which deed the said A. Montgomery remised, released, and quitclaimed to said plaintiff all that certain tract of land lying and being in Colusa county, California, being a part of Larkin's children's grant, described as follows, to wit: Beginning at the northeast corner of a tract of land now occupied by Otho S. Mason, which corner
34 is in the middle of the first large slough east of county road running from Colusa to Red Bluff, at a point one-half mile south of township line between townships eighteen and nineteen north, thence west along the northern boundary of said Mason tract to the west boundary line of said grant, at ¼-section post one-half mile south of said township line; thence north along said line of said grant one mile to ¼-section post ½ mile north of said township line; thence east parallel to said township line to the Sacramento river; thence down said river to a point one-half mile south of said township line; thence west to the middle of the before-mentioned slough; thence along the middle of said slough towards the north and west to the place of beginning, containing 3,300 acres, more or less.

J. D. DE JARNATT recalled.

Direct examination:

Mr. HARRINGTON: I wish to ask you, with reference to the description of the land as shown in the deed from Montgomery to Packer, what relation the land opposite the Sacramento river where this island would be would bear to the description as contained in the deed.

A. I wish to state, before answering that question, that neither the U. S. surveys nor the survey of that patent, according to the field-notes, show any island there at all, and according to the field-notes of the patents the lands described in that deed would embrace a larger portion of the S. ½ of section 32. The north line of
35 Mr. Packer's land would strike the Sacramento river just half a mile north of the township line between townships 18 and 28, in section 32.

Q. You have a plat before you there?

A. Yes, sir.

Q. What is that plat taken from?

A. Taken from field-notes embracing calls Nos. 18 to 19, inclu-

sive, of the survey accompanying the patent of the Larkin's children's grant and covering the land in controversy.

Q. What island is referred to, if you can state from the description as shown by the map accompanying the patent?

A. That would be the island just below the township line; the island at the east end of Mr. Packer's tract of land.

Q. Where would that island be located on the plat?

A. If located at all it would appear, from the field-notes and according to the U. S. survey, to be in section 32, the greater portion of it in the S. W. ¼. This other plat—that is, the plat made by me—differs apparently from the plat accompanying the survey of the grant, in this, for the reason that the plat of the grant is made on a very large scale. This is made on a scale of thirty chains to the inch. With reference to the location of the land in controversy the county map is incorrect.

36 Q. I will ask you first, is that county map correct with relation to the location of the land in controversy?

A. That county map is correct with reference to the U. S. official surveys.

Q. Showing the island?

A. No; the U. S. survey don't show any island; but the island on the county map was put there at the suggestion of Mr. Green, who was assisting me at that time in making the map. He said to me there was an island there, and I asked him to locate it as near as he could, and he did so, and I placed the island in the river according to the information that I got outside.

Q. Now I wish to ask you whether that county map, as showing the location of the island upon it, is correct or incorrect.

A. Well, it must be incorrect.

Q. Why is it incorrect?

A. From the fact that I don't suppose Mr. Green could have located that from his mind correctly. A location of that character, of course, demonstrated the incorrectness of the county map so far as that island is concerned.

Q. I wish to ask you, Mr. De Jarnatt, respecting that slough. Can you state approximately the size of it?

A. I estimated by my eye the opening of the slough at the north to be almost 40 feet wide, the water surface, and the opening of the slough at the south to be almost 60 feet wide on the water

37 surface. I should judge the river to be there at least 3 or 4 hundred feet wide. I think at the south end of the island the river would be 30 or 40 feet wider than it is at the north end. I first saw that island about the 4th of March of this year. I had been to Butte City before, but never knew the existence of an island there before. In coming down the river it struck me that a person could hardly know the existence of an island there without his attention being called to it. The brush and undergrowth nearly met at the mouth of the opening at the north end.

Q. I will ask you if a person standing above the northern point of this island, looking down the river, unless he had his attention

called to that matter specially, would be likely to observe the fact that the slough came out from the river there?

A. I am very sure he would not. That slough compares with the river at that point about as 40 is to 360.

Q. With reference to the navigability of the stream, how does it compare?

A. Well, it would not compare well.

Cross-examination of J. B. De Jarnatt:

Mr. Bayne: You made the official map of Colusa county?

A. Yes, sir.

Q. You drew it from the official surveys of the United States Government?

A. Yes, sir.

38 Q. Does that map represent the island here in controversy?

A. There is an island; the one I laid down Mr. Green located for me; Mr. Green told me there was an island there somewhere, and we put it in there. I put it down as near as I could locate it from what he told me.

Q. Locate it as it is described—where it is shown on this map.

Mr. Harrington: We object to that as irrelevant and immaterial. It should appear that the map has some idea of accuracy about it, otherwise the evidence is wholly immaterial.

The objection is overruled by the court, counsel for plaintiff reserving an exception.

A. It would be in the S. ½ of sec. 32 or in sec. 32; principally on the S. ½ of 32.

Q. State where it appears on this map to be located, with reference to what is marked on the map as Butte City.

A. This map locates the island on the S. ½ of sec. 32, south and west from Butte City and in the Sacramento river. The other plats that I have here have been drawn since the commencement of this action.

Redirect examination of J. B. De Jarnatt:

Mr. Harrington: I wish to ask you now respecting this Colusa county map whether or not this land in controversy is actually located upon this map?

39 A. The land in controversy is not located—that is, it is not located properly upon that map; there is an island shown there.

Q. Why is it not located properly upon that map?

A. Because I had nothing to locate it properly from.

Q. Why, as a matter of fact, is it not located properly?

A. Because the surveys—Government surveys—fail to show any island there.

Q. I understand you say that this map is not a correct location of the land in controversy?

A. That is not—that is to say, that map shows the island near the

middle of the river. In that it is wrong, because the island is not in the middle of the stream or near the middle of the stream.

Q. Is it in the stream at all?

A. It is not in the main stream at all.

Q. How is it separated from the Sacramento river?

A. How is it separated from the Sacramento river? Well, this slough runs around it. (I guess that is a part of the Sacramento river.)

Q. Is the slough which runs around this island any part of the Sacramento river or the navigable part of the river?

A. Well, I should say not.

Recross-examination of J. B. De Jarnatt:

40 Mr. Bayne: You say you would not say it is navigable. Why was it not navigable? Did you ever sound it or measure it?

A. No, sir; I have not.

Q. Was there anything to interfere with the navigability except overhanging trees and trees themselves?

A. Yes, sir.

Q. What else did you discover?

A. I discovered bottom in one or two places—one place a little island coming up; it was a sort of sand bar, with drift-wood lodged there. I did not pay any strict attention to it. I could not tell, from what I saw, whether that supposed impediment I saw there was of recent formation, of the last year or two, or whether it had been there for a long time before. I have never had any experience in navigation.

Q. Where does the water in the slough come from?

A. It comes from the Sacramento river.

Q. Did it have any current?

A. I didn't notice any current. It seemed to be dead water in there. Of course, there must have been some current, but I didn't pay any attention to that.

Q. What was the appearance of the banks between this island and the mainland—were they high banks?

41 A. Yes; pretty high banks. The banks along the slough, I would judge, were from 20 to 25 feet high, and were about the same on the island as on the mainland.

Q. Pretty high generally on the island?

A. The brush and undergrowth was so thick, of course, I did not pay any special attention to it, but I should judge they were about the same all the way around.

Redirect examination of J. B. De Jarnatt:

Mr. Harrington: Did you see anything while you were there which would indicate that this slough running around this island was the Sacramento river or the stream or the channel of the river?

A. No, sir.

Q. Where was the channel of the river with respect to the land in controversy?

A. On the east side of the island.

Q. Where is the middle of the stream?

A. East of the island.

Q. Where is the western shore of the Sacramento river at the point of land in controversy?

A. Well, if I were called upon to determine that point at the time of my visit to that island I would have called the eastern side of the island the western bank of the Sacramento river.

Mr. BAYNE: I will ask you one question: When you were around this island how many were with you and how did you go?

42 A. There were three of us and we went in a little skiff. We had no difficulty in getting around.

Plaintiff next called E. McDANIEL, who, being sworn, testified as follows:

I have known the land in controversy 31 years. I reside below the land in controversy. My north line is a little below the lower end of the island. I have resided in that neighborhood 31 years in September. I have been to the land in controversy and am familiar with the course of the Sacramento river at that point. To be above the land and look down you could see a slough take off from the river and run around. A person would have to notice particularly to see the slough.

Q. During the period of time that you have been familiar with the course of the Sacramento river at that point—above and about this land—where has been the western bank of the Sacramento river?

A. My opinion would be that the east bank of that island is the west bank of the Sacramento river. I so conclude because the great majority of the water in the navigation is there. The navigation has never been anywhere else that I know of. The main body of water runs on the east side of that island. I call what is on the west side of the island a slough. I never saw the slough dry at any place I was at.

Cross-examination:

43 I never meandered around this slough. The observation I made was from the east side of the river. I have been on the west side. I have been at the slough at the mouth and at the upper end. I do not know whether I ever saw the water at any other places and know nothing about it. I never was around it. The width of the island I do not know. It starts in narrow and widens out and narrows then at the upper end. I never went across it.

GEORGE F. PACKER, being sworn, testified as follows:

(It is admitted that the defendants *was* in possession of the land in controversy and were at the time of the commencement of this action.)

I received a deed from A. Montgomery, dated May 1st, 1867, for

certain lands described therein, which I immediately took possession of after the delivery of the deed to me. I took possession of the whole tract. That includes the land in controversy. I own land south of there for a mile down.

Q. Since you have known this land, where has been the Sacramento river with reference to the point of land in controversy?

A. As far as this river is concerned, it has changed less there than any place I know of. There have been no changes on the main banks; might have been a little filled on the bottom, but the slough is the same as when I first went there—about the same. There is a
44 little place on the slough bank sloughed off and made it a little wider than it was when I first knew it. The east side of the island is the west bank of the Sacramento river. That slough varies in width. It is from 40 to 60 feet wide. The river is about 400 feet wide. I have never heard of any obstruction to navigation in the river at that point. It has always been navigable. I do not know the depth of the river. This slough was dry enough last year to drive across. I never drove across the Sacramento river nor heard of it being done.

Cross-examination:

I had been along there before, but my first acquaintance with the place was in 1867. When I took possession I did not go into the island. I went on farming there where it was open. There was no farming done in the brush. I have not done anything right on the island. There are other parts of my land I have not been on, too. I did not run my fence across the body of water between the island and the mainland. We did not fence any more than we had need to. There was nothing ever on that, and the stock did not bother us in getting that way until this brush had been cut out. I did not consider that body of water that goes around this island as one of the enclosures of my land. There is nothing to separate the island and the mainland except this body of water. I don't know whether that body of water ever went dry before entirely, before last
45 summer, but very near dry before; quite shallow; could wade across; there was sand up in places. I think there were places down towards the lower end that were dry before last summer, but last year I am certain it was dry.

Redirect examination:

I have always regarded the Sacramento river as one of the boundaries of my land. There never was any fencing along the river.

JOSEPH BOUND, being sworn, testified as follows:

I have known the land in controversy about 30 or 31 years and have been acquainted with the course of the Sacramento river at that point. The Sacramento river has always been, during the period I have known it, where it is now—on the east side of the island. The west bank of the Sacramento river is and has been during the time I have known it on the east side of the land, in con-

troversy. The water that was around this island is a small slough. It is quite small compared with the Sacramento river. The Sacramento river has always been on the east side of this island. I have been up and down the river often in boats. The boats never went anywhere else but on the east side of that island. Mr. Packer has been in possession of that land since his purchase, so far as I know.

Cross-examination:

I do not know anything about who has been in possession
46 of it. I have seen the body of water on the west side of the island for the last 30 years, for a month or two at a time—most every day. I have waded the slough many a time and forded it with horses in the summer seasons. Years ago I crossed it where it was not more than 2 feet deep. I think I have seen it 20 feet deep.

Redirect examination:

It was very high water when the water was 20 feet deep in the slough—when the river overflowed everywhere. In ordinary stages I would think the depth of the slough was 2 or 3 feet. I think it is perhaps 4 feet deep now. The river is not shallow water yet. I do not know the depth of the river at that point. The steamers on the river draw 18 or 20 inches or 2 feet; some of them, I suppose, deeper; have never known any obstruction to navigation on the east side. I think the banks of the river at the point of land in controversy are the same as they were 30 years ago, with the exception of the lower end of the island. I think that is getting farther down—a little longer, perhaps—filling up with sediment and sand from the river. There are no appreciable changes being made in the banks of the river at that point or in the river above the island. I have made close observations of this island. Standing north, I do not think you could see the outlet of the slough without close observation. That island is about half a mile long; contains maybe 30 or
50 acres—about 50 acres. The land on this island is gen-
47 erally sandy and brushy. I should think there might be some good land on it to cultivate. There used to be a piece of natural, clear land near the center of it, towards the upper end—3 or 4 acres, perhaps. I do not know how it is now.

Recross-examination:

When this body of water was 3 feet deep at low water was years ago. I have not been about there much for several years. It was perhaps 16 years ago. I saw the island a great many times since that, but not to be familiar with it.

F. M. DELANEY, being sworn, testified as follows:

I have known the land in controversy since 1858. I considered the Sacramento river, in 1858, to be where it is now—August, 1858—and that is on the east side of the island—the Sacramento river proper. The navigable part of the river is on the east side of the

island. I have never known any other part to be navigable—that is, where the middle of the stream—the thread of the river—is.

Cross-examination:

All the time I have known the land in controversy water has been running around it.

Plaintiff rests.

W. F. MILLER, being sworn for defendants, testified as follows:

I reside at Butte City; resided in that neighborhood over 20
48 years. I believe I am familiar with the land in controversy. I have been around that channel of water that runs around on the west side very frequently. I have been around it in a skiff. I have examined as to its depth with oars. I was hunting a place I could ford it with stock. At that time the shallowest place was something like 5 feet. That was in the spring of the year—about April or May. I think the lowest stage of water is about in October. My recollection is it was not far from its lowest stage at that time. That channel was dry last year. 1864 was about the dryest season we had up there. In extreme low water that year there was plenty of water there. I was there in the fall of 1864 nearly every day. It was running water. I did not sound it. The head and foot of that channel have been filling up, and it has been growing shallower all the time since I have known it, and also narrowing. I helped survey this island. I would not think that was a true diagram of it (examining). When I first knew that island the water ran all the way around.

Cross-examination:

During the period of time I have known the Sacramento river the main channel of the river has been on the east side of that island. The main current is never on the west of the island. I have never known any steamer to come around there. I always considered the east side of the river the navigable stream.
49 I have known it for 20 years. Last season the end went dry—not the whole thing. I was endeavoring to cross with stock from the west side of the island. I never tried to go from the other side because it is wider and, I think, deeper. I never sounded it there. My judgment would be it was deeper and has been all the time. At the time I went across it it was not in the very lowest water. I think the lowest water is in about October or a portion of November. There is some difference between the months of April and May and October and November, I think. I would not think there was several feet. I have noticed caves off the bank of the river on the east side of this island, probably 15 or 20 yards. I don't know when that occurred. I think in the last ten years.

THOMAS SCOTT, being sworn for defendants, testified as follows:

I live down at Mr. Kilgore's place, 3½ miles above Colusa. I know the island in controversy. I was on the island at one time

for three months. I have not been there in 21 years. I was there in December, 1862, and January and February, 1863. I did not know the island prior to that. The water in the west channel was pretty high pretty much all the time I was there. We used a skiff for crossing back and forth, and the west bank at the head of the island was higher and for quite a ways down, and at the lower end it was pretty high. I think at that time we called the island
50 from 60 to 100 acres. I was there at the time of the highest water in 1862 and '63—December, 1862, and January and February, 1863. I do not know what the depth in the west channel was at that time. I should think it was somewhere from 15 to 20 feet, anyway, at the time of the highest water, and it was probably 100 feet wide or upwards. It was running water.

Cross-examination:

When I was there I believe was the highest water ever known in this country since it has been inhabited by Americans—the highest water at that time. I never have been there since.

J. PING, being sworn for defendants, testified as follows:

I was acquainted with this land in controversy, and with this west channel, somewhat, in 1871. The island was said to be about 100 acres. I knew it in the summer and fall of 1871. I frequently crossed the west channel on a horse. The lowest water I could find was a little over 3 feet. The river was then low—about medium low—at that time. The water in the west channel was running water. The bank on the west of the island was pretty steep. Where I got water out of the river for use it was sloping. That was on the mainland on the west side. The island was abrupt. The point of the island was pretty steep, and the banks, I reckon, were from 18 to 20 feet high; maybe more. When the water was 3½ feet there was about the lowest stage that there was during all the season.

51 Cross-examination:

I was there in the summer and fall of 1871. I crossed it in the fall—in September and October both, I think. I never crossed Sacramento river only in boats. What we called the main river was east; it was the larger. I do not know where the channel or current of the river was.

GEORGE BUCHANAN was sworn for defendants and testified as follows:

I reside at Butte City. I have known the island in controversy since 1853. It was an island in 1853. I never was through the west channel at that time. I first went through the west channel in the winter of '61–'2. There was plenty of water then. It was high water. I saw the water all around the island, but never went on the island. The west channel was wider then than it is now. It has been filling up ever since I knew it, from the sides and bottom, too. When I first knew it the bank edges were probably 20 or 30

feet wider than now. The water now is 45 to 65 — wide. When I first knew it I judge it must have been 85 feet wide. I never knew the channel to be dry until last year. I crossed it 12 or 13 years ago, all through the fall and summer season, with horses. I crossed it all stages in low water. I judge the water was from 3 to 4 feet, and I swam it many a time with horses.

Cross-examination:

I have known the Sacramento river since 1853. During
52 the time I have known this land in controversy the navigable portion of the river—the middle of the stream—has been on the east side of the island.

Captain G. P. PAGE was sworn for defendants and testified as follows:

I am a pilot and captain. I commenced navigating the Sacramento river in 1851 and '2, and been engaged in it up to the present time nearly. I know the land in controversy, and have known it since 1851 and '2. The water of the Sacramento river was on all sides of it at all periods of the river. It was then an island. I have never been in the west channel at low water. There was a large amount of water there at high water. I went around it with a 200-ton steamer, between 150 and 160 feet in length, and probably 30 feet beam—about the same size as the boats now. That was high water when I went around, perhaps 12 feet above low water.

Q. Was there any obstruction to navigation?

Plaintiff objects to the question as irrelevant and immaterial. The objection is overruled, plaintiff excepting.

A. No; no particular obstruction. I never went around the west channel except in high water.

Q. How much of the year during the period from 1851 to '58 or '59 would the water have been at such a stage as to permit of its navigation by such boats as were then engaged in the navigation of the river?

53 Plaintiff objects on the ground it is irrelevant, immaterial and incompetent The objection is overruled, plaintiff excepting.

A. Well, perhaps three months.

Q. What depth of water does it require for such boats as were then engaged in the Sacramento river to navigate it?

Plaintiff objects on the ground it is irrelevant and immaterial. The objection is overruled, plaintiff excepting.

A. I would say about 3½ feet of water. It was that deep all around the west channel, I think, except at the head of the island, in the fall, at low water. I never knew it to be dry until last fall. The west channel was perhaps 125 feet wide from 1851 to '58 or '59. The east channel was a good deal more—about 250 feet; about twice as wide.

Q. Captain, what was the character of the bank on this west channel from 1851 to 1859, as to whether it had steep banks or bluffs, or how? Describe how the banks were.

A. Well, pretty tolerable steep banks. They were somewhere from eighteen to twenty feet high. I should judge about like the average banks along the river. The banks of the island were not quite so high as those of the mainland, but at that time the difference was not very large.

Q. Have you ever seen that island submerged?

Plaintiff objects on the grounds it is irrelevant and immaterial.

54 Objection overruled, plaintiff excepting.

A. I think I have. There might be some small portion out of the water. That was at a very high stage of water. When it was covered the condition of the neighboring land on the main shore was that on the Butte City side of the river the water was very near to the top of the bank—would not vary from a few inches from the top of the main bank along that Butte City shore. The other side is not so high, and the water would be over it, too, as well as over the island. This submersion would not continue long, as it falls very rapidly after getting up to high-water mark. I think Captain Rodgers put some snags in the west channel last fall at the foot of the island; that would naturally cause bars to form.

Cross-examination:

I am not quite sure he put snags at the lower end. At the time I went around the island in the west channel I did so to avoid strong currents.

Q. Where were the strong currents?

A. I would describe it as being on the Butte City side of the river.

Q. Where is the Sacramento river, and where has it always been at that point—the river, the navigable river?

A. The navigable stream has been on the east side of the island.

Q. Has been ever since you have known it?

A. The navigation?

Q. Yes, sir.

55 A. Yes, sir.

Q. Has there been any appreciable change in that island in the last 33 or 34 years, in increasing its dimensions or diminishing the dimensions of the island, either?

A. At the head of that island, the main bank of the river—that would be on the west—it has filled in there and there is willows grown up.

Q. Captain, I will ask you if there has been, since you have been on the river, any filling up of the space between the banks in this outlet that comes from the river at that point and forms that island? Has there been any filling up of the space between the banks of this slough or this west channel, as you are pleased to call it, since

you have been on the Sacramento river and this land between the banks?

A. Yes, sir; of course, it is filling up constantly; all the time it is filling up.

Q. The filling in, has it fallen against the west side of this channel or against the eastern side of the channel? Does it form more island or does it add to the bank on the west side?

A. Well, I would think it was about evenly divided; if anything, the advantage would be on the mainland side. It has filled out there more than it has from the point of the island in.

Q. In other words, then, this bank is receding or increasing, rather?

A. Increasing very rapidly, and has been for several years.

56 Q. Now, when you speak of that having been 125 feet when you first knew it, did you mean by that in time of high water, or did you mean it was that wide from bank to bank?

A. Well, that would be my judgment just in looking at it. I never have been around there in low water.

Q. Could you go around there in low water at any time you knew of with safety?

A. With the steamboat?

Q. Yes, sir.

A. Well, I don't know; perhaps years ago it might have been done.

Q. Would you, as a pilot, at any time you have been steamboating on the Sacramento river have considered it advisable to take a steamboat around that island in time of low water?

A. No, sir; it would not have been necessary.

Q. Would it have been advisable as captain of a steamer having the responsibility that rests on a man in navigating with and using a boat as you have done?

A. Well, I wouldn't naturally run around there, as a matter of course?

Q. Why?

A. Well, because the main channel, of course, would be the other way.

Q. That has always been so, has it not, since you have known the river?

A. Yes; I should so consider it.

57 Q. Could you, Captain, at any time, even at times of high water, have gone around there with a steamboat with a barge attached?

A. Oh, yes; I think so.

Q. You think a boat with a barge attached could have gone around?

A. Yes.

To the COURT:

Q. I want to understand what you mean by high water—extreme high water—or what do you mean?

A. I mean anything from 12 to 15 or 18 or 20 feet—anywhere along there.

Q. What is the extreme high water—the number of feet?

A. It is something over twenty-six feet here, I believe, at this point. It is not so much up there. It would be three or four feet less there at extreme high water than it is here, I would think.

To Mr. HARRINGTON:

Q. How many times did you navigate the Sacramento river with a steamer before you took it into your mind to go around this island with a steamer?

A. Oh, I could not tell about that.

Q. You say the object you had in going around at that time was to avoid the current of the river?

A. Yes.

Q. The current, then, was in the main channel or on the eastern slope of this island—that is where the strong water is?

58 A. Yes, sir; the strong water is in the east channel, and that is what I desired to avoid in going around there in the west channel. I have been around there two or three times altogether. There are places between here and Princeton that years ago we used to run around that are now entirely filled up; for instance, right around here by the warehouse we used to run on the opposite side of that island there; that was the main channel. There are a good many places between here and Sacramento you could run a steamer out in. During the time I have known the Sacramento river—the main river—the main channel of the river for navigation has always been on the eastern side of the island.

Redirect examination:

I would not consider the west channel navigable in low water; still it may be; I don't know; I never was around there to see. That would be my judgment. There is a current in the west channel; it is running water.

Recross-examination:

There was timber on this island, but I don't recollect how much it hung.

Q. Was there hanging timber on this island when you went up through there, on either side?

A. There was timber there, but I don't recollect how much it hung now.

Q. What do you call this pole——

A. (Int.) Jackstaff.

Q. Did you have occasion to lower the jackstaff?

59 A. No; I don't think we did, as we do run a great many island chutes.

Q. Up and down the river?

A. Yes, sir; in high water; quite a number.

Redirect examination:

The west channel has filled up very much at the foot. Perhaps the east channel has been widening a little since I have known it, but not very much.

Recross-examination:

Q. Captain, what do you call that west channel? Do you call it a slough, or call it a channel?

A. I call it an island—the land. I don't look at that stream as a slough.

Captain JAMES C. RODGERS was sworn for defendants and testified as follows:

I am master of the steamer "Seizer," for the Government of the United States—a snag boat. My general occupation is that of steamboat master, and has been for thirty-three years. I am thoroughly acquainted with the Sacramento river. I began navigating it in the winter of 1852–'3. Cottonwood creek, Middle creek, and Clear creek are higher up the river than the land in controversy. Since my first trip up that river, in the winter of 1852–'3, I have navigated it every winter since, and pretty much every summer for the last 4 or 5 years. I know the island in controversy; have known it 33 years. A channel of the river runs around this island on the west.

60 Q. State what channel was in 1853 and what it has been since.

A. I navigated around that island—on both sides of that island. What time do you say?

Q. From '53 to this time?

(Reporter reads the question.)

A. That island in 1833, from the appearance of the water, was near about the centre of the river.

Q. How was the navigability of the west channel there at that time?

A. You could go around at any stage of the water if you wanted to, but it was an out-of-the-way place; it was not a straight course. We were looking for the nearest and straightest course to run our boats and barges.

Q. You could go around at all times?

A. We could at that time—in 1853; at all times of the year we could go around it.

Q. You could go around it in what kind of a craft?

A. A boat of one hundred and fifty tons register; the same class of boats exactly as we are using to-day, drawing two feet of water.

Q. How was it from 1853 down, say, to the 1st of January, 1858?

A. You could still go around in 1858; could do so with the same class of boats; since that time it has been gradually filling up. I have been around there twice with boats of the same class

61 we are using now; boats one hundred and fifty feet long and thirty-six to forty feet beam, fourteen-inch cylinders. From

1853 to 1858 that west channel was sixty or seventy feet wide at the narrowest place in the elbow. There was a light current all the time, only at high water there was more current because there was more water in the river. There was a distinct current. I would see drift running through it. The water in this west channel came out of and emptied into the Sacramento river.

Q. Do you know what was the average depth of the water in that west channel from 1853 to 1858?

A. It was about five feet; lowest water we had in September or October. I recollect once, in September, running in there, in one of the first storms we had somewhere along those months, to avoid a storm. I left my barge and backed in alongside that island to get out of the storm. I know it was dead low water. It was September or October, 1865.

Q. When was it that you went through there with a steamboat?

A. I went there with a steamboat in 1853, and in, I think, 1852—1850 or 1852. I was trying a project then, and I did not know the river, and, of course, I went behind all the islands and inside and outside all of the islands.

Q. Examining the river?

A. Yes, sir; examining the river.

62 Q. From 1853 to 1858 state what obstructions, if any, there were to navigation in the west channel.

Plaintiff objects on the ground it is irrelevant and immaterial. The objection is overruled, plaintiff excepting.

A. There was no obstruction there; only at the head and foot of the island there was sand and gravel deposited. It commenced filling up about 1850 or '51.

Q. Was there, from 1853 to '58, any obstruction to navigation in the west channel?

Plaintiff objects on the ground it is irrelevant and immaterial. The objection is overruled, plaintiff excepting.

A. About 1858 this deposit had commenced work on the main banks, and also at the head and foot of the island. In 1857 there was no obstruction if you wanted to go there.

Q. From 1853 to '58 that west channel was navigable by such steamboats and other craft as were at that time used on the Sacramento river?

Plaintiff objects on the ground it is irrelevant and immaterial. The objection is overruled, plaintiff excepting.

A. You could go through if you wanted to. It wouldn't be for the lack of water. I never saw the water clear over the island. I went in there on two occasions to keep out of the strong current. The third time I backed in there to keep out of a

63 storm. I never backed in there with a boat at any other time. There was not a great deal of difference in the east and west channels from 1853 to 1858. The filling up is increasing very rapidly in the last 4 or 5 years. I put snags in the west chan-

nel myself, because it was out of the general course of navigation. The west channel was dry last year at the foot of the island; never saw it so before.

Q. Explain more fully why was it the east channel was more commonly used than the west channel in early times.

Plaintiff objects on the ground it is irrelevant and immaterial. Objection overruled, plaintiff excepting.

A. It was a straighter channel, more easily made.

Mr. BAYNE: This has been shown here as a diagram by the plaintiff of this island, and so on. I wish you would state whether or not that is a correct outline of the island, and so on.

(Showing to witness the diagram or map of the premises, made by Mr. De Jarnatt, and herein set out with his testimony.)

A. It is not. I do not recognize that as the island at all. It is not a true copy of the island. It is not a true diagram of the island. Any man that is a judge of the island and knows it as I do would recognize the island.

Q. Is this west channel represented correctly?

64 A. No, sir; nothing is represented correctly.

Q. What are the errors?

A. The point on the east side. There is a point on the east side of this island (pointing).

Mr. HARRINGTON: A bend of the river?

A. A bend of the river on the east side.

Q. Coming down in that shape (pointing)?

A. Yes, sir; coming down in that shape, and this island runs away down in here; comes down like the big end of an egg. There is water down in here (pointing). It don't run that way at all, or it didn't. It is filling up now, but I wouldn't know it. I wouldn't recognize it at all.

Mr. BAYNE: Then I understand you that this upper part of the channel, which is represented at the upper end of the island, comes out at too sharp an angle. It should slope off more from the river and take more nearly the course of the river than it does on this?

A. It should be an easier grade than that—an easier grade. There is none of this about that island (showing), and there should be a cove come in here to correspond with that. I looked at the map of the county up here on the next street. I don't know what street it is. I looked at the map of the county—the official map of Colusa county—which is a true diagram of the situation, in my opinion.

Q. Was that the map that you saw or one like it?

65 (Showing witness a map of Colusa county, bearing the following on its face:)

"Official map of Colusa county, California. Compiled and drawn from official surveys by J. B. De Jarnatt. Approved and declared

1853 to 1858 that west channel was sixty or seventy feet wide at the narrowest place in the elbow. There was a light current all the time, only at high water there was more current because there was more water in the river. There was a distinct current. I would see drift running through it. The water in this west channel came out of and emptied into the Sacramento river.

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Q. Explain more fully why was it the east channel was more commonly used than the west channel in early times.

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A. It was a straighter channel, more easily made.

Mr. BAYNE: This has been shown here as a diagram by the plaintiff of this island, and so on. I wish you would state whether or not that is a correct outline of the island, and so on.

(Showing to witness the diagram or map of the premises, made by Mr. De Jarnatt, and herein set out with his testimony.)

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A. A bend of the river on the east side.

Q. Coming down in that shape (pointing)?

A. Yes, sir; coming down in that shape, and this island runs away down in here; comes down like the big end of an egg. There is water down in here (pointing). It don't run that way at all, or it didn't. It is filling up now, but I wouldn't know it. I wouldn't recognize it at all.

Mr. BAYNE: Then I understand you that this upper part of the channel, which is represented at the upper end of the island, comes out at too sharp an angle. It should slope off more from the river and take more nearly the course of the river than it does on this?

A. It should be an easier grade than that—an easier grade. There is none of this about that island (showing), and there should be a cove come in here to correspond with that. I looked at the map of the county up here on the next street. I don't know what street it is. I looked at the map of the county—the official map of Colusa county—which is a true diagram of the situation, in my opinion.

Q. Was that the map that you saw or one like it?

65 (Showing witness a map of Colusa county, bearing the following on its face:)

"Official map of Colusa county, California. Compiled and drawn from official surveys by J. B. De Jarnatt. Approved and declared

the official map of Colusa county. By order of the board of supervisors, at the February session, A. D. 1854.

"C. KOPF,
"*President Board of Supervisors.*
"GEO. M. SUTTON,
"C. J. DIEFENDORF,
"*Supervisors.*

"Attest: GILES G. CRANDALL,
"*County Clerk.*"

A. Yes, sir; I think that is the kind of a map; that is the map. There is the island (showing).

Mr. BAYNE: We offer this map in evidence, if your honor please, in connection with Captain Rodgers' testimony—the official map of Colusa county.

Plaintiff objects to its introduction on the ground that its incorrectness was stated and established by the positive testimony of the gentleman who drew it, and that, therefore, the map itself is incorrect and not entitled to be admitted in evidence.

The objection is overruled and the map admitted in evidence.

To this ruling plaintiff excepts.

The map was then admitted in evidence and showed an island in the middle of the river at the point in controversy.

66 The COURT: Does that represent the relative width of the water there on the east and west?

A. It does; that is why I recognize it; that other map I don't understand it at all.

Mr. BAYNE: At what time does that represent the relative width?

A. In 1853 and down to 1858, when I say these changes commenced to be perceptible.

The following is a copy of so much of said map as is material here:

(Here follows diagram marked p. 66*a*.)

Cross-examination:

The first time I went up river I went on east side of the island and came down on east side; next time I went up on west side, because the river was high and I wished to get out of all the strong water. In 1853 if you had kept the middle of the stream you would have fetched up at the head of this island. The channel on the west side in 1853 was 60 or 70 feet wide, on the east side over 100 feet. The river now must be 150 or 160 yards wide. The river has been getting wider and shoaler since 1853; the eastern bank has been wearing away. There are some oak trees on the island 20 or 24 inches through; none of that size come near the edge; there are cottonwood and willows near the edge 12 to 14 inches through. The west bank of the main river has been shoaling. In the last thirty years the stream (in the west channel) has been diminished three-

quarters or seven-eighths; it is now not more than 8 or 10 feet
67 wide at the head; down below it was 50 feet wide. It was in October or November of last year (1883) I saw it; the stage of the water then was a foot lower than I ever saw it in the Sacramento river; it was the lowest water we ever had. When it was 70 feet the water was 15 or 20 feet higher than it is now. I never tried to go around there at a low stage of water. There was no water at the lower end of it last summer. At the time I went around that island it was 15 or 20 feet—high water. I backed up there once at low water and found no bottom, my boat drawing two feet. At this time the main body of the river is on the east side of that island. In 1853 the water was equally divided for depth. I sounded it. What induced me to sound it was that it was my business, and I found it 7 or 8 feet; in August or September, 1853 or '54—it was in 1854—both on the east and west it was 7 or 8 feet deep. My object in making soundings in the west channel was that I wanted to know what water was in there. It was part of my business to make soundings in the Sacramento river and make the report. The river on the east side was the better channel for navigation because it was straight. The east channel, in 1854, was 30 to 40 feet wider than the west channel, from bank to bank, but I could not say there was any difference in the depth. I only sounded at the head and at the foot of the island in the east channel. In the west channel
68 I sounded all the way from the foot of the island up to the head. The island is not as large now as in 1853 and '54. The first time I went up the river I observed an island there. I put snags at the head and west shore of the west channel—not in the channel itself, but immediately above. The calculation was to break the water off there; to let all the water in the east channel. Last fall the lower end of the west channel was dry. I could not swear it was not dry at some other point, because I did not see it.

Redirect examination:

When I backed up in that channel it was low water, but not as low as it was last year. When I ran through it was when it was 15 feet higher than it is now.

Recross-examination:

The widest part of the island in 1853 and '54 must have been 3 or 4 hundred yards. I never measured it. I never made any measurements of the channels of the river either, only by my eye.

Redirect examination:

I made no measurements, except as to depth. Our boats were 30 to 38 feet wide, and we can use them in making an estimate of the width. The west channel from 1853 to '58 was from 60 to 70 feet wide at the narrowest point. It was fully a hundred yards wide at the widest point. The greatest width of the west channel
69 was from 150 to 200 feet. That was at the mouth, at the foot of the island.

Recross-examination:

I never went clear around the west channel in low water. I went up the west channel in low water in a skiff in November, 1862. I don't think there was anybody with me at the time, and I sounded it. I sounded the east channel on the steamboat and the depth was 7 to 8 feet.

Captain JAMES C. RODGERS was recalled for defendants and testified as follows:

I put snags both at the head and the foot of this island. Those put at the foot were put, I should think, about 100 feet below the foot of the island.

Defendants rest.

This was all the testimony.

The cause was thereupon submitted to the court for its findings and decision; and thereafter, to wit, on September 19th, 1884, the court made and filed its written findings and decision and ordered judgment in favor of the defendants therein.

Motion for New Trial.

Plaintiff now moves the court to vacate and set aside its findings and decision and judgment in said action and to grant him a new trial thereof upon the following grounds, to wit:

I.

70 Insufficiency of the evidence to justify the findings, decision, and judgment of the court.

II.

That the findings and decision of the court are against the evidence.

III.

That the findings and decision of the court are against the law.

IV.

Errors in law occurring at the trial and excepted to at the time by the plaintiff.

I.

Specifications.

And the plaintiff now specifies the particulars in which the evidence was insufficient to justify the findings and decision and the judgment of the court, to wit:

(*a.*) The evidence was insufficient to justify the finding No. I in that it finds that the land in controversy in this action is an island in the Sacramento river.

(*b.*) The evidence shows that the land in controversy is separated from the mainland by a slough, which is not marked or platted upon the Government survey of said land.

(*c.*) The evidence shows that the United States survey, the field-notes, and plat accompanying the patent of the lands known
71 as the Larkin's children's grant, and being lands lying on and west of the Sacramento river above and below and at the point of the land in controversy, fail to disclose any island or land separated from the mainland, by a slough or otherwise, at the point of the land in controversy.

(*d.*) The evidence shows that the land in controversy is located in section 32, township 19, and between the calls 22 and 23 of the patent and survey of said Larkin's children's grant, while the said patent and survey and plat do not show any island thereat or land separated from the mainland, by a slough or otherwise.

(*e.*) The evidence shows that the western bank of the Sacramento river at the point of land in controversy is the eastern shore of the land in controversy.

(*f.*) The evidence shows that the *medium filum aquae* is east of the land in controversy.

(*g.*) The evidence shows that by the calls and stations in the survey and field-notes and the plat accompanying the patent under which plaintiff claims the land in controversy is included in the description of the lands conveyed to him by deed from A. Montgomery of part of the said Larkin's children's grant.

(*h.*) The evidence was insufficient to justify the finding No. II because it appears by the patent, survey, field-notes, and plat accompanying the patent of the said Larkin's children's grant that
72 there was no island shown at the point of land in controversy at the time of the issuance of said patent or at the time of the survey of said grant, and because the evidence shows that the Sacramento siver or the *medium filum aquae* has at all times been and is on the eastern side of the land in controversy.

(*i.*) The evidence was insufficient to justify said finding No. II and findings III, 4, and 4½ because the evidence shows that the land in controversy is a part of the Larkin's children's grant, as shown by the patent, field-notes, survey, and plat thereof, and because it is further shown by the evidence that the said land is located in section 32, township 19, and between calls 22 and 23 of said survey, and it is only separated from the mainland by a slough, and because the thread of the stream or the middle of the river at said point is and has always been on the eastern side of the land in controversy.

(*j.*) The evidence was insufficient to justify the finding No. III because it is shown by the evidence that the western bank of the Sacramento river is the eastern shore of the land in controversy, and because by the patent, survey, and plat in evidence it is shown that the land in controversy is embraced and included within the calls of plaintiff's deed from A. Montgomery.

(*k.*) The finding in V is against the evidence because the
73 evidence shows that the land in controversy is a part of a

larger tract conveyed by deed from Montgomery to plaintiff, and the same being a part of the said Larkin's children's grant.

(*l.*) The finding No. VI is against the evidence because the evidence shows that in the survey of the said Larkin's children's grant there was a plat of the land made and appended to said survey which showed the location, width, and course and appearance of the Sacramento river at the point of land in controversy, but which did not show any island in the river or land separated from the mainland, by a slough or otherwise, thereat, or that there was any other than one channel of the river at said point.

(*m.*) The finding No. VII is against the evidence because the evidence shows that the land in controversy is included within the calls of plaintiff's deed from A. Montgomery to him.

(*n.*) The said finding No. VII and finding No. VIII are against the evidence because the evidence shows that the plaintiff has had and held the possession of said land ever since his entry thereon and upon the said larger tract, as described in his said deed from Montgomery, until he was ousted therefrom by the defendants.

(*o.*) The evidence shows that at the time alleged in said complaint of plaintiff that the defendants entered upon the land in controversy and ousted the plaintiff from the possession thereof.

II.

74 And plaintiff now specifies the errors in law occurring at the trial and excepted to at the time by the plaintiff.

The court erred in overruling the objection by plaintiff to the offer of defendants in evidence of the Colusa county map as showing the situation of the land in controversy, and erred in admitting in evidence the said map against the objection of plaintiff.

JOHN T. HARRINGTON,
Attorney for Plaintiff.

Due service of the foregoing proposed statement of the case or statement on motion for a new trial is accepted this 9th day of December, A. D. 1884.

W. G. DYAS AND
STABLER & BAYNE,
Attorneys for Defendants.

I hereby certify that the foregoing is true and correct statement of the case, and the same is hereby settled and allowed.

E. A. BRIDGFORD, *Judge.*

Dated February 10th, 1885.

Order Denying Motion for a New Trial.

(Title of court and cause.)

April Session, 1885.

APRIL 9TH, 1885.

Plaintiff's motion for a new trial was submitted and by the

75 court taken under advisement, and the court, having fully considered the same and being now fully advised in the premises, orders that said motion for a new trial be, and the same is hereby, denied.

E. A. BRIDGFORD, *Judge.*

A true copy.
Attest: W. H. MILES, *Clerk,*
By S. M. BISHOP, *Deputy.*

Notice of Appeal.

(Title of court and cause.)

To Messrs. Stabler & Bayne and W. G Dyas, attorneys for the defendants above named, and to the clerk of said court:

Take notice that the above-named plaintiff appeals to the supreme court of the State of California from the order made in this action on the 9th day of April, 1885, denying said plaintiff's motion for a new trial, and from the judgment made and entered in said action by said court against the said plaintiff and in favor of said defendants and from the whole and every part of said judgment.

JOHN T. HARRINGTON,
Attorney for Plaintiff.

76 Endorsed: Service of a copy of the within notice of appeal accepted this 1st day of June, 1855. W. G. Dyas and Stabler & Bayne, attorneys for defendants.

Endorsed: Filed June 1st, 1885. W. H. Miles, clerk, by S. M. Bishop, deputy.

Stipulation.

It is hereby stipulated and agreed that the foregoing transcript contains true and correct copies of all the papers necessary and proper to be used on this appeal; that the requisite undertaking on appeal in due form was properly filed within the time prescribed by law; that the foregoing is a full, true, and correct transcript.

W. G. DYAS AND
STABLER AND BAYNE,
Attorneys for Respondents.

——— ———,
Attorney for Appellant.
J. S. W., *D. C.*

(Here follow diagrams marked pp. 77 & 78.)

78½ Due service of a copy of the within admitted this sixth day of July, A. D. 1885.

W. G. DYAS AND
STABLER & BAYNE,
Attorney- for —.
J. S. W., *D. C.*

79 *Submission.*

In the Supreme Court of the State of California.

PACKER
v.
BIRD *et al.* } 11162.

1886.
May 5. Appellant allowed 40 days to file brief; respondent 20 days to reply; cause to be thereon submitted.
June 26. Cause ordered submitted.

Title of court and cause.

Oct. 21. Filed petition for rehearing.
Oct. 23. Rehearing denied.
The court.

80 *Judgment.*

In the Supreme Court of the State of California, Department Two.

GEORGE F. PACKER, Appellant,
vs.
JAKE BIRD and FRANK BIXLER, Respondents. } No. 11162. On Appeal from the Superior Court in and for the County of Colusa.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Thornton, J. We concur: McKee, J.; Sharpstein, J.

Whereupon it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Colusa in the above-entitled cause be, and the same are hereby, affirmed.

81 *Opinion.* (*Filed September 28th*, 1886.)

Department Two.

PACKER
vs.
BIRD *et al.* } No. 11162.

In this action the controversy relates to an island in the Sacramento river, in that portion of the river which is a navigable stream.

The plaintiff claims under a patent from the United States issued on a confirmed Mexican grant. The land as granted was bounded by the Sacramento river and lay on the west side of the river. The patent by its terms is also bounded by the river.

The contention of plaintiff is that the land granted and patented

to him, being bounded by the river, extends to the thread of the stream and includes the island.

We do not concur in this view. The river being navigable, in fact, the title extends no further than the edge of the stream.

82 We think this conclusion accords with the rulings in People *vs.* Gold Run D. & M. Co., 4 W. C. Rep., 518, and Lux *vs.* Haggin, 10 Pac. Rep., 674.

We think that the court ruled correctly in holding that the plaintiff acquired no title to the land sued for by the patent of the United States in this case.

The appellant relies to sustain his contention greatly on the judgment in the Railroad Company *vs.* Scheirmeir, 7 Wall., 272. We cannot perceive its applicability to the facts of this case. The land sued for here is clearly an island. The court in the case cited manifestly did not hold the land in controversy to be an island. The slough, so called, in that case was not nor was it held to be a part of the Mississippi river.

It makes no difference that the portion of the Sacramento river on the west side of the island is not ordinarily navigable or

83 not navigable at all. There is but one river, and that a navigable one. The waters on each side of the island constitute parts of one navigable stream.

The judgment and order are affirmed.

THORNTON, *J.*

We concur.

McKEE, *J.*

SHARPSTEIN, *J.*

84 *Bond.*

Supreme Court of the United States.

GEORGE F. PACKER, Plaintiff,
vs.
JAKE BIRD and FRANK BIXLER, Defendants.

Know all men by these presents that we, George F. Packer, George Hagan, and W. P. Harrington, of the county of Colusa, State of California, are held and firmly bound unto Jake Bird and Frank Bixler, of the same place, in the sum of five hundred dollars, to be paid to the said Jake Bird and Frank Bixler, their executors or administrators; for which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 22nd day of August, 1887.

85 Whereas the above-named George F. Packer hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of California:

Now, therefore, the condition of this obligation is such that if the

above-named George F. Packer shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEORGE F. PACKER. [SEAL.]
GEO. HAGAN. [SEAL.]
W. P. HARRINGTON. [SEAL.]

86 STATE OF CALIFORNIA, } ss:
County of Colusa, }

George Hagan and W. P. Harrington, being severally duly sworn, depose and say and each for himself saith that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

GEO. HAGAN.
W. P. HARRINGTON.

Subscribed and sworn to before me this 22nd day of August, 1887.

[NOTARIAL SEAL.]

W. H. MILES,
Notary Public, Colusa Co., Cala.

I approve the above bond and the sufficiency of the sureties thereto.

I hereby certify to the sufficiency of the within sureties, and the within bond as secured by them would be approved if presented to me.

Dated Aug. 22nd, 1887.

E. A. BRIDGFORD,
Superior Judge, Colusa County.

87 (Endorsed:) This bond is approved both as to its form and the sufficiency of the sureties thereon. Aug. 25, 1887. Stephen J. Field, justice of U. S. Sup. C't.

(Endorsed:) Filed September 1st, 1887. J. D. Spencer, clerk, by Frank Myers, deputy.

88 UNITED STATES OF AMERICA, ss:

To Jake Bird and Frank Bixler, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 10th day of October, A. D. 1887, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein George F. Packer is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this 25th day of August, A. D

1887, and of the Independence of the United States the one hundred and twelfth.

STEPHEN J. FIELD,
Justice of U. S. Supreme Court.

89 [Endorsed:] 11162. In the Supreme Court of the United States. George F. Packer, plaintiff in error, *vs.* Jake Bird & Frank Bixler, defendants in error. Citation. Filed September 1st, 1887. J. D. Spencer, clerk, by Frank Myers, deputy.

STATE OF CALIFORNIA, *County of Colusa,* } *ss:*

Charles M. Perdue, being duly sworn, deposes and says that he is a citizen of the United States and a resident of the county of Colusa, State of California, over the age of twenty-one years, and that he is not a party to or in any way interested in the within-entitled action; and affiant further deposes and says that on the 29th day of August, A. D. 1887, he served the within citation on the within-named defendants in error, Jake Bird and Frank Bixler, by delivering to each of said defendants personally, in the county of Colusa, State of California, a true copy of said citation and at the same time exhibiting to him the said original citation.

CHAS. M. PERDUE.

Subscribed and sworn to before me this 30th day of August, A. D. 1887.

[SEAL.] H. M. ALBENS,
Notary Public.

90 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court, before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between George F. Packer, plaintiff, and Jake Bird and Frank Bixler, defendants, wherein the said plaintiff claimed title to the premises demanded in said action under the treaty between the United States of America and the Mexican Republic, concluded and signed at the city of Guadalupe Hidalgo on the 2nd day of February, A. D. 1848, and under the act of the Congress of the United States, approved the 3rd day of March, A. D. 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and the acts amendatory thereof and supplementary thereto, and under the act of the Congress of the United States, approved the 21st day of August, A. D. 1852, entitled "An act making appropriation for the civil and diplomatic expense of the Government for the year ending the

thirtieth of June, one thousand eight hundred and fifty-three, and for other purposes," and under a patent issued by the United States under the treaty and statutes aforesaid, and in which the decision in said action is against the title so specially set up and claimed under the treaty and statutes aforesaid, a manifest error hath happened, to the great damage of the said George F. Packer, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal U. S. Circuit Court, Northern Dist. Cal.

Witness the Hon. Morrison R. Waite, chief justice of the Supreme Court of the United States, this 25 day of August, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

L. S. B. SAWYER,
Clerk U. S. Circuit Court, Nor. Dist. Cal.

The above writ of error is hereby allowed.
STEPHEN J. FIELD,
Justice of U. S. Supreme Court.

91 [Endorsed:] 11162. In the Supreme Court of the United States of America. George F. Packer, plaintiff in error, *vs.* Jake Bird & Frank Bixler, defendants in error. Writ of error. Filed September 1st, 1887. J. D. Spencer, clerk, by Frank Myers, deputy.

92 *Clerk's Certificate.*

In the Supreme Court of the State of California.

GEORGE F. PACKER, Plaintiff in Error,
vs.
JAKE BIRD and FRANK BIXLER, Defendants in Error. } No. 11162.

I, J. D. Spencer, clerk of the supreme court of the State of California, do hereby certify that the foregoing eighty-nine pages, numbered from one to eighty-nine, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause above-entitled, and that the same together constitute the return to the annexed writ of error.

Seal Supreme Court of California.

Witness my hand and the seal of the said supreme court this 6th day of September, A. D. 1887.

J. D. SPENCER.
J. S. WILLIAMS, *Deputy.*

Endorsed on cover: California supreme court. No. 111. George F. Packer, plaintiff in error, *vs.* Jake Bird and Frank Bixler. Filed September 23, 1887.

Office Supreme Court U. S.
FILED.
DEC 4 1890
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1890.

GEORGE F. PACKER,
Plaintiff in Error,

vs.

JAKE BIRD AND FRANK BIXLER,
Defendants in Error.

No. 111.

BRIEF FOR PLAINTIFF IN ERROR.

W. C. BELCHER,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States,

OCTOBER TERM, 1890.

GEORGE F. PACKER, *Plaintiff in Error,*

vs.

JAKE BIRD AND FRANK BIXLER, *Defendants in Error.*

No. 111.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a writ of error to the Supreme Court of the State of California, to review a judgment of that Court affirming a judgment of the Superior Court of the County of Colusa in favor of the defendants in the action.

The action was ejectment, brought by the plaintiff in error against the defendants in error, to recover possession of a tract of land, commonly called "Packer's Island." A rough diagram of the land in controversy will be found facing page 36 of the record.

Plaintiff deraigned title through a patent from the United States (pp. 7–16) for the "Rancho of Larkin's Children," a tract of land granted by the Mexican Government. Defendants claimed no title, and the only question in the case was whether the land in controversy was within the calls of that patent.

The land patented is described in the decree of confirmation (p. 8) as bounded on the east by a line commencing at a certain point "on the Sacramento river," and running thence southerly "on the

margin of said river" to a point five leagues south of the place of beginning. The field notes of survey contained in the patent (pp. 9–11) describe this line as commencing at a certain oak post "on the right bank of the Sacramento River," and thence "traversing the right bank of the Sacramento river down-stream" certain courses and distances. A copy of the map attached to the patent will be found in the record immediately following the diagram before referred to. The tract in controversy is at course number 23 as shown on that map. At that place neither the map nor the field notes show the existence of any island in the river, though several islands at different points on the line are mentioned in the field notes and indicated on the map. There was no evidence as to whether or not the courses and distances given in the field notes (independently of the call for the bank of the river) would include the land in controversy. The Sacramento River, at this place, is a non-tidal stream, navigable in fact.

There was evidence tending to show, and which, plaintiff claims, did establish, that the easterly margin of the tract in controversy constituted the "right bank" or "margin" of the river at that place; that this land was separated from the so-called main land by a narrow depression, called in that locality a slough, which was filled with water from the river at high stages of water, and which, at low water, was sometimes dry; that this slough was not navigable in fact and did not constitute a channel of the river; and that this tract was sometimes submerged at high water.

The action was tried before the Court without a jury, and the Court found (p. 3) that this land was an "island" in the Sacramento river, surrounded by the waters thereof, and having a navigable channel of the river on each side, and that the west bank of the river lay to the westward of the channel passing westerly of said island; and held that, for those reasons, the land was not within the calls of plaintiff's patent. Judgment was accordingly rendered for defendants, and from that judgment and from an order denying his motion for a new trial, plaintiff appealed to the Supreme Court of the State.

By the law and practice in California, it is a ground for the reversal of a judgment or an order refusing a new trial, that the evidence does not justify the finding of the Court; and where an exception is taken to the finding on that ground, and supported by a statement or bill of exceptions setting forth the evidence, it is the

duty of the Supreme Court to examine the evidence, and, if the finding is seen to be contrary to or unsupported by the evidence, to reverse the judgment or order.

In the present case, plaintiff specified (pp. 34–36) the incorrectness of the findings in the particulars mentioned, and supported his motion and appeal by a statement of the evidence. On appeal he contended that the land conveyed by the patent extended *at least* to the margin of the navigable Sacramento river, without regard to the courses and distances of the meander line; that the evidence showed that the slough in question was not navigable, and was therefore not a channel of that river; and that the land in controversy was therefore not an island in the river, but a part of the land on the bank of the river and therefore within the calls of the patent.

In that state of the case it became the duty of the Supreme Court of the State to determine, (if that question were material to the controversy,) whether or not the finding that the land in controversy was separated from the main land on the west by a navigable channel of the river, was supported by the evidence. But that court (p. 39) ruled that this question was immaterial, and declined to examine the evidence on this point, or to determine the correctness of the finding in that particular. It ruled that plaintiff's title extended no further than the edge of the stream, and said:

"It makes no difference that the portion of the Sacramento river on the west side of the island is not ordinarily navigable or not navigable at all. There is but one river, and that a navigable one. The waters on each side of the island constitute parts of one navigable stream."

In the foregoing manner is raised the only question involved in this case, namely: Whether a grant from the United States, of land described as bounded by the margin of a non-tidal stream, navigable in fact, does or does not include a piece of land lying on that side of the stream, and separated from the main land only by a small unnavigable branch of the stream. Plaintiff contends that this question should be answered affirmatively.

ASSIGNMENT OF ERRORS.

Comes now the said George F. Packer, by W. C. Belcher, his attorney, and says that in the record and proceedings in the above entitled matter there is manifest error in this, to-wit:

1. That the Court erred in holding and deciding that the patent from the United States to Francis Larkin and others for the "Rancho of Larkin's Children," did not, by its terms, convey land lying on the westerly side of the Sacramento river, between the northern and southern boundaries of said rancho, and separated from the main land only by a small unnavigable branch of said river.

2. That the Court erred in holding and deciding that said patent did not, by its terms, convey the demanded premises.

3. That the Court erred in holding and deciding that it is not material in this case whether the water separating the demanded premises from the main land is navigable or not navigable.

4. That the Court erred in holding and deciding that the land conveyed by said patent did not, by the terms of said patent, extend to the margin of the navigable channel of the Sacramento river.

Wherefore the said George F. Packer prays that the judgment of the Supreme Court of the State of California may be reversed, annulled, and altogether held for naught, and that said Court be directed to enter judgment reversing the judgment and order of the Superior Court of the County of Colusa.

ARGUMENT.

We contend that the land conveyed by the patent in question, extends *at least* to the margin of the navigable channel of the river; that the land in controversy is a part of the land so conveyed, unless it is separated from that land by a navigable channel of the river; and that the State Court therefore erred in holding that it is not material whether the slough to the west of this tract is navigable or not navigable.

If the river mentioned in the patent were not navigable in law, the lands granted, being bounded by the "margin" of the river, would extend to the thread of the stream.

Ex parte Jennings, 6 Cow. 518;
Jones v. *Soulard*, 24 How. 41;
Howard v. *Ingersoll*, 13 How. 381.

The doctrine of the cases cited includes cases like the present, where the stream, though navigable in fact, is above tide-water. But later cases in this Court disregard that distinction, and hold that the title to lands bordering on streams navigable in fact, whether tidal or not, stops, under the Acts of Congress, at the stream.

It is not necessary in this case to discuss this distinction. Treating this river as navigable in the common-law sense, it is manifest that the grant in question extends to the *stream*, that the grantee is a riparian proprietor, with the right of access to the *channel*, and that there can be no vacant land left for appropriation between the river and the river boundary of such tract.

Railroad Co. v. *Schurmeier*, 7 Wall. 287;
County of St. Clair v. *Lovingston*, 23 Wall 46, 63.

This being so, it is clear that, unless plaintiff's land extends to the navigable channel, it is not bounded by the river at all. It is only the navigability of the river which prevents his title from running to the middle of the stream. But that very fact entitles him to access to the navigable channel, and to the right to construct landings and wharves for the convenience of commerce and navigation. If the "slough" on the west of this parcel of land is not navigable, and is yet the eastern boundary of plaintiff's land, it would follow that plaintiff is deprived of all access to the river for purposes of commerce and navigation, and that there is vacant land left for appropriation between his land and the river;—neither of which things can legally be true. A slough of this character cannot be considered a part of the river, so as to constitute a boundary, unless it is itself navigable. This necessarily follows from the ruling in *Railroad Company* v. *Schurmeier*. It was there held that, by the terms of the Acts of Congress regulating the survey of the public lands, the margin of a navigable river should constitute the boundary of lands bordering thereon. By this must be intended the navigable stream itself, not some unnavigable branch or fork of it. Indeed, when the boundaries of land are described as extending to a river, the main river, and not a branch, slough, or bayou, is the termination of those lines.

Graves v. *Fisher*, 5 Greenl. 69.

The State Court sought to distinguish this case from the Schurmeier case, saying (Record, p. 39):

"The court in the case cited manifestly did not hold the land in controversy to be an island. The slough, so-called, in that case was not nor was it held to be a part of the Mississippi river."

This is, of course, true. But, when we examine the facts of that case, we find that the reasons for so holding apply equally to this case. The land in that case was a parcel which, at very low water, was separated from the main body by a slough or channel, twenty-eight feet wide, through which no water flowed, but in which water remained in pools; at medium water, the water flowed through the slough, making an island of the parcel; and, at high water, the whole parcel was submerged. No mention was made of any such channel in the official survey under which the patent was issued. It is evident that those facts correspond with those held by the State court in this case to be sufficient to prevent a recovery by plaintiff. The slough there was as much a part of the Mississippi river as the slough here is a part of the Sacramento river. Each of them was connected with the river at each end, and each received its water from the river. It is manifest that the reason why this court held the slough in the former case not to be a part of the Mississippi river, was because it was not navigable, and because, if it were held to be the boundary, there would remain vacant land between the navigable stream and the land in terms bounded on that stream, thus cutting off the riparian owner from access to the stream. But that is the precise proposition which the State court held to be immaterial in this case; and, in so ruling, that court manifestly misconstrued the acts of Congress under which plaintiff's title was obtained.

We therefore submit that a judgment of reversal as prayed for should be entered.

W. C. BELCHER,
Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
JAN 2 1891
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1890.

GEORGE F. PACKER,
Plaintiff in Error,

vs.

JAKE BIRD AND FRANK BIXLER,
Defendants in Error.

No. 111.

Brief for Plaintiff in Error in Reply.

W. C. BELCHER,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States,

OCTOBER TERM, 1890.

GEORGE F. PACKER,
Plaintiff in Error,

vs.

JAKE BIRD AND FRANK BIXLER,
Defendants in Error.

No. 111.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY.

AS TO THE JURISDICTION.

Counsel for defendants in error has suggested in his brief that there is no federal question involved in this case. No reasons are assigned for this suggestion, although the question at issue is distinctly stated in our opening brief. That question, we repeat, is: Whether a grant from the United States, of land described as bounded by the margin of a non-tidal stream, navigable in fact, does or does not include a piece of land lying on that side of the stream, and separated from the main land only by a small *unnavigable branch* of the stream.

Plaintiff claimed title under a patent from the United States for a grant originally made by the Mexican Government, and confirmed and surveyed by the United States, which patent described the land as bounded by the margin of a stream of that character. The construction of that patent in this particular depends upon the construction of the acts of Congress for the settlement and survey of private land claims in California, and the question at issue, above stated,

can be determined only by a construction of those statutes. Plaintiff set up and claimed title to the demanded premises under those statutes, and the decision of the State Court was against the title so set up and claimed, and was based on a construction of those statutes which we claim to be erroneous. A question within the jurisdiction of this Court is thus presented.

The true rule on this subject, as we conceive, was laid down by the Supreme Court of California in *Waterman* v. *Smith*, 13 Cal. 373. In that case Mr. Justice FIELD, speaking for the Court, said (pp. 411, 415,) as to Mexican grants in California:

"The right to make the measurement and to give the juridical possession remained with the government [of Mexico], and could only be exercised by its officers. That right, like all other public rights, passed, with the transfer of the territory, to the government of the United States, and is now to be exercised in accordance with its laws. * * * The survey and measurement are to be made, not in accordance with the laws of the old government, which were abrogated with its authority, but in accordance with the policy and laws of the new government. * * * The right of survey passed, with other public rights, to the government of the United States, and is to be exercised in pursuance of its policy, and in conformity with its laws."

So, this Court, in *Fremont* v. *The United States*, 17 How. 542, 565, said:

"The right which the Mexican Government reserved to control this survey passed, with all other public rights, to the United States, and the survey must now be made under the authority of the United States, and in the form and divisions prescribed by law for surveys in California."

For similar reasons, this Court, in *Railroad Company* v. *Schurmeier*, 7 Wall. 288, in deciding that "the title to lands bordering on navigable streams should stop at the stream," placed its decision "upon the several acts of Congress making provision for the survey and sale of the public lands bordering on public navigable rivers, and the legal construction of the patents issued under such official surveys." And the Court, speaking of the reservation, in those acts, of the beds of such streams, said:

"Such a reservation, in the acts of Congress, providing for the survey and sale of such lands, must have the same effect as it would be entitled to receive if it were incorporated into the patent."

The question, therefore, is wholly as to the true construction of the acts of Congress; and, as plaintiff's title depends upon that construction, the question is within the jurisdiction of this Court.

It may be remarked that in *Howard* v. *Ingersoll*, 13 How. 381, where a writ of error was granted to a State court upon a similar state of facts, the jurisdiction of this Court was disputed, and that question was fully argued. (Pp. 387–389.) The point was not mentioned in the opinion, but must necessarily have been overruled, as jurisdiction was entertained, and the judgment of the State court was reversed.

In his argument upon the merits, counsel for defendants assumes that the question now presented is one of fact, namely: whether the slough in question is or is not navigable. Were that the point, certainly this Court would have no jurisdiction; for the question would then be merely as to where, on the ground, are the monuments referred to in the patent. But, as we said in our opening brief, that question, which the State Supreme Court had jurisdiction to decide, and which it was its duty to decide, it declined to determine; and its refusal to determine that question was based on its ruling that, under the true construction of the acts of Congress, plaintiff's land was bounded by that slough, whether navigable or not. The case, then, was determined by that Court by a decision of the federal question alone; and the question of fact, which that Court might have determined, was not passed upon at all.

Our contention in that Court was that, according to the true intent and meaning of the Congressional legislation on the subject, the boundary defined in plaintiff's patent was the *thread* of the Sacramento River, or, if not, that it extended *at least* to the margin of the navigable channel of that river, and that, in either case, the demanded premises were within that boundary. The Court held that the land granted did not extend to the thread of the stream, but stopped at the bank, that the bank of a *branch* of that stream, though such branch was not navigable was, in law, the bank of the river itself, and that therefore there might be ungranted land above water, between the granted premises and the navigable channel of the stream. Those were the only points decided, and for those reasons alone plaintiff's title was held to be invalid. The jurisdiction of this Court is therefore clear.

AS TO THE MERITS.

Counsel for defendants disputes some statements of fact made in our opening brief. We think that our statements were, in each case, correct and supported by the record.

1. There is certainly no evidence whatever, and none has been pointed out, as to whether the *field notes* in the patent (exclusive of the call for the bank of the river) include or exclude the land in controversy. Course 23, which passes that land, may, for all that appears, run along the *easterly* margin of this so-called island. This, however, is not material; as the river, and not the meander line, is the boundary.

2. The idea of counsel that this island is mentioned in the field notes, is evidently based on a wrong reading. The testimony and maps of both parties show that this island, if it be an island, is situated on the course numbered 23 on the patent map, and north of the line between townships 18 and 19. That course, in the field notes, (page 10, third line above folio 21) reads: "thence south thirty-eight degrees west, seventy-five chains to station, the *north end* of an island in the river, which is here only about three chains wide." It will be seen that the station at the end of this course is *on* the island there mentioned, thus including at least a part of that island in the survey, and that that station is at the north end of that island. A reference to the map shows that this point is *south* of the township line, not north of it as counsel supposes. The intersection with the township line referred to by him is on course 26, the township line having been twice crossed before that time, though the intersections are not given in the field notes, as the township line had probably not then been run across that small bend. The island there referred to is, therefore, not the one in controversy. This matter, like the one above mentioned, is not material in this Court.

On the merits of the case, it would seem hardly necessary to add anything to what was said in our opening. As said above, counsel for defendants has argued the case as if the question was merely whether the testimony does or does not show that this slough is navigable. Of course there is no such question before this Court. The State Supreme Court did not determine that question, because, they said, "it makes no difference that [this slough] is

not ordinarily navigable or not navigable at all." We contend that it does make a difference, and that question we submit to this Court. Our propositions are these:

If the land described in the patent as bounded by the river, does not extend to the thread of the stream, it can only be because, by the acts of Congress, the survey, in case of navigable streams, is required to stop at the bank of the stream.

The bank of a navigable stream, within the meaning of that rule, is the bank of the main stream, if there be but one navigable channel; or, if there be more than one navigable channel, then the bank of the channel first intersected by the survey.

A non-navigable slough, bayou, or branch of the stream, is not a part of the stream in such sense that the survey should stop on reaching its bank; but the survey must continue until it reaches the bank of a navigable channel.

The grantee of land bounded by a navigable stream, is entitled, by the terms of the grant, to access to the navigable stream, and to the right to construct landings and wharves thereon; and therefore there can be no ungranted land above water between the granted land and the navigable portion of the stream.

The State Court therefore erred in holding that the slough in question, though not navigable, was a part of the Sacramento River and therefore the boundary of plaintiff's land.

These propositions, we submit, necessarily follow from the statutes of the United States regulating the public surveys and the issue of patents, in accordance with the construction given to those statutes by this Court in the cases cited in our opening. No discussion of the weight of testimony in the case would be proper, nor shall we attempt any. The question is simply one of law, and as such we submit it.

W. C. BELCHER,
Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY
CLERK.

In the Supreme Court of the United States,

OCTOBER TERM, 1890.

GEORGE F. PACKER,
Plaintiff in Error,
vs.
JAKE BIRD AND FRANK BIXLER,
Defendants in Error.

No. 111.

BRIEF FOR DEFENDANTS IN ERROR.

Wad. H. Holt

Attorney for Defendants in Error.

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SUGGESTION.

Before proceeding to discuss the case upon its merits, the defendants in error suggest that the writ should be dismissed, for want of jurisdiction, for that it appears that the action is between citizens of the same State, and that there is no federal question involved therein.

STATEMENT.

While it is true that "by the law and practice in California, it is ground for the reversal of a judgment or an order refusing a new trial, that the evidence does not justify the finding of the Court," it is equally true that the Appellate Court will not reverse such judgment or order where there is a substantial conflict in the evidence, and there is any evidence to support the finding.

Bearing this in mind, and examining the record in the case, it will be seen that the statement made on behalf of plaintiff fails to show the whole case upon which the Supreme Court of California was called to act.

I think the counsel is mistaken, when he says, on page 2 of his brief, that "there is no evidence as to whether or not the courses and distances given in the field notes (independently of the call for the bank of the river), would include the land in controversy." As I understand the record, the plat marked "No. III, page 78," given in the record, gives the field notes, courses and distances, and marks the line of the eastern border of the grant, within which alone plaintiff is shown to have acquired any land, and under which he claims title, and the line so marked, and field notes so given certainly exclude the land in controversy.

So also of the statement immediately preceding the one quoted, to the effect that neither the map or the field notes show the existence of such an island in the river. It will be seen by reference to the description in the patent (page 9, folio 19), that the point of commencement is the northeasterly corner of the rancho, on the bank of the river. The survey runs thence down stream, traversing the right bank of the river, and at folio 20 reference is made to an island in the river. At folio 21 reference is made to another island in the river (see second line above the figure 21). By continuing the reading for half a dozen lines it will be seen that this point is quite a little distance above the township line between townships eighteen and nineteen north. While it is true that no island is marked on the map as being in the river at that point, it is also true that all the testimony in the case shows the island forming the tract in controversy to be located at that exact point.

We also disagree with counsel in his statement or claim that the evidence establishes the fact that the easterly margin of the tract in controversy constitutes the right bank or margin of the river at that point; or, as he otherwise states it in effect, that the tract in controversy is not in fact an island, but a portion of the main land, simply separated from the main body of the land by a slight depression, through which water occasionally flows. And as the case turned in the courts in California upon this question of whether or not this was in fact an island, a somewhat full reference to the testimony on the subject seems desirable.

The official county map, adopted by the board of supervisors in 1854; a section of which is inserted in the record opposite page

32, shows it is an island in the river. De Jarnatt, who made this map, testifies to the fact that there was such an island, at that time, but now thinks that the map is not entirely accurate in the matter of the location of the island, (p. 17, f. 36.) Capt. James C. Rodgers, master of the government snag boat, who has been many times around the island, thinks this map correctly locates the island. (P. 31, f. 64) Mr. De Jarnatt was never around the island until March 1884, (f. 37,) and then estimated the arm of the river, which he designates as a slough, to be 40 feet wide at the upper end, and 60 feet wide at the lower end of the Island. At folio 39 he says speaking of this slough, as he calls it, "I guess that is a part of the Sacramento river," but when asked is it any part of the navigable portion of the river he adds, "I think not." His whole testimony shows that he knows but very little about it. He does, however (f. 41), testify that the banks, on both sides, are from 20 to 25 feet high.

Mr. McDaniel, a witness called for plaintiff, has known the land in controversy for thirty-one years, and never saw the slough, as he also calls it, dry at any place. (ff. 42–43.)

Mr. Packer, the plaintiff, testifying in his own behalf, says the slough is from 40 to 60 feet wide; that last year it was dry enough to drive across, (f. 44,) but does not know that it ever went dry before. (f. 45.) He no where says that it ever went dry, but simply that it was "dry enough to drive across."

Joseph Bound, called for plaintiff, has know the island 30 or 31 years; in ordinary stages the water in the slough is two to three feet deep, has seen it twenty feet deep; the island is about half a mile long. (f. 46.)

W. F. Miller, called for defendants, has known the island for twenty years; has frequently been through the channel on the west side in a skiff, has examined it as to depth with the oars, hunting a place to ford it with stock; the shallowest place he could find was about five feet, and the water was not far from the lowest stage at the time; the channel was dry last year, but in 1864, was the dryest season we had up there, and then there was plenty of running water there in the fall, which the witness says is the dryest portion of the year. This is the substance of his testimony found at folio 48.

Thomas Scott was on the island for three months in the winter of 1863, at the time of the highest water; thinks the water was then, in the west channel, 15 to 20 feet deep, and probably 100 feet wide. (ff. 49, 50.)

J. Ping knew the island in 1871; frequently crossed the west channel on a horse, the lowest water he could find was about three feet deep; this was running water, at about the lowest stage of the season. (f. 50.)

George Buchannan has known the island since 1853; went through the west channel in 1861-2; there was then plenty of water—it was high water; the water is now (the last of June 1884) 45 to 65 feet wide; never knew the channel to be dry until last year, (1883); 12 to 13 years ago crossed this channel at all stages of low water with horses; it was then from three to four feet deep. (f. 51.)

Down to this point the testimony has all been given by witnesses whose means of knowledge, and reasons for knowing, whereof they testified, were such only as entitles their evidence to such weight alone as would be given to any one who undertook honestly and conscienciously to testify to the fact as it was impressed upon his mind by mere casual observation of the subject matter. None of them had peculiar means of knowledge, or special reasons for observation, except, possibly (as to the reasons for observation), Mr. De Jarnatt, and his observation was taken too late, and not with sufficient care, to be of special value. But we come now to a class of witnesses, entirely disinterested (like most of the others), who had reason to know whereof they spoke, whose business rendered them competent to judge, and necessarily made their observation special and careful.

The first of these in order is Capt. Page, a river pilot, who has been engaged in the navigation of this river from 1851-2 down to the present time (folio 52). He says this was an island in 1851; that the water of the Sacramento river was on all sides of it, at all periods of the river; that there was a large amount at high water; that once he went around it with a 200 ton steamer, 150 or 160 feet in length and probably 30 feet beam, a boat about the same size as those which now navigate the river (folio 52); that such a boat requires about three and a half feet of water,

and that it was that deep in the west channel, except at the head of the island, in the fall at low water; that he never knew it to be dry until last fall (1883); that he thinks the west channel was 125 feet wide from 1851 to 1858-9; that the banks were tolerably steep, and from 18 to 20 feet high (folio 53); and that he thinks Capt. Rodgers put some snags in the west channel last fall (folio 54). (That fact would of itself account for the sudden shoaling in 1883). He also thinks he could have gone around there with a steamboat, with a barge attached (folio 57); has been around there two or three times altogether; would not think the west channel navigable in low water, though it might be; there is a current in the west channel, *it is running water* (folio 58).

The next is Capt. Rodgers, master of the government snag boat. He is thoroughly acquainted with the Sacramento river; commenced navigating it in the winter of 1852-3; has navigated it every winter since, and pretty much every summer for the last four or five years; has known this island for thirty-three years; a channel of the river runs around it on the west, (f. 59); has navigated around the island, on both sides, from 1853 to this time; in 1853 you could get around the island, through the west channel *at any stage of the water* if you wanted to, but it was an out of the way place, not a straight course; *you could get around it in* 1853 *at all times of the year, with a boat of* 150 *tons register*—the same class as are being used to-day—*and this down to* 1858; I have been around there twice with boats of the same class we are using now—boats 150 feet long and 36 or 40 feet beam; from 1853 to 1858 the channel was sixty to seventy feet wide at the narrowest place in the elbow; there was a light current all the time—a stronger one at high water—a distinct current; the average of the water was about five feet at the lowest water we had in September or October; at the head and foot of the island was a sand or gravel deposit; in 1858 it commenced to work in on the main banks; 1857 there was no obstruction there if you wanted to go; from 1853 to 1858 the west channel was navigable by such steamboats and other crafts as at that time were used on the Sacramento river; the filling up is increasing very rapidly for the last four or five years; *I put snags in the west channel myself*, because it was out of the general course of navigation; that channel was dry last year at the foot of the island—I never saw it so before, (ff. 62-3); the channel on the

west side in 1853, was 60 to 70 feet wide, and on the east side over 100; the river must now be 150 or 160 yards wide; it has been getting wider and shoaler since 1853—the eastern bank has been wearing away; *there are oak trees on the island, 20 or 24 inches through*; (f. 66); at this time the main body of the river is on the east side of that island; *in* 1853 *the water was equally divided for depth, I sounded it*—it was my business—in September, 1854, both on the east and west sides of the island it was seven or eight feet deep. (f. 67). There is more of this sort from the same witness, but this seems sufficient.

ARGUMENT.

This statement of the case, which is a brief summary of all the evidence, and which the Court will find fully borne out by the record, coupled with so much of other matter as is stated by the counsel for plaintiff, seems to do away with the necessity for argument. While there is a mere color of evidence to support the contention of plaintiff, the overwhelming preponderence of all the testimony supports the findings of the Court *nisi*. This being so under the law and practice in California, the Appellate Court could not disturb those findings.

As we understand him, the counsel concedes that the lands granted, and conveyed by the patent, are bounded by the "margin" of the river. The Court has found in effect that the channel west of the island is a portion of the river, and we submit that under the evidence the finding cannot be disturbed.

Neither of the cases cited by counsel for plaintiff are in point, for in neither of them do the facts bear any relation to those in the case at bar. In *Railroad Company* vs. *Schurmier* (7 Wall. 272), the land in dispute was a small parcel, of only 2.78 acres, part of the water front of the city of St. Paul, manifestly cut off from the main land by the washing of the Mississippi River at that point, and between which and the main land there was a slight depression, not corresponding with the bed of the river as to depth, but so shallow that water ran through it only at the very highest stages, and so narrow as to constitute a simple thread, as compared with the balance of the river, so shallow and narrow as scarcely to have constituted a line of demarkation, at

ordinary stages of water, between the tract in dispute and the main land of which it was claimed to be a part. The court below found that this was not an island, but was in fact a part of the government subdivision fronting on the bank of the river. The facts as proved and found are not at all to be compared with those proved and found in this case.

County of St. Clair vs. Lovingston, (23 Wall. 46) is even less in point. The question there decided is that when a deed calls for a course down the stream, with the meanders thereof, the boundary is low water mark. This means low water mark of the stream, as it was established by nature at the time of the grant, not low water mark as it may be made thirty years afterwards, by the direct act of man, in putting in snags and obstructions into the stream, by means of which the water is shut out from the bed of the stream.

Neither has *Graves vs. Fisher* (5 Greenl. 69) any application here. There the question was whether a small peninsula (not an island) was included in the grant.

Counsel concedes that under the later decisions of this court, the title to lands bordering on streams navigable in fact, whether tidal or not, *stops at the stream*. This being the case it is difficult to see upon what theory it can be claimed that the findings and judgment in this case can be reversed. The lands in controversy are in and surrounded by the running waters of a stream, navigable in fact, and the waters whereof have been navigable on both sides of and all around the lands, for more than thirty years before the commencement of this action, and if they have ever ceased, even temporarily, to flow on all sides of it, it has been by reason of the act of man, and not from natural causes.

We respectfully submit that the judgment should be affirmed.

Chas. D. Cox

Attorney for defendants in error.